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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JULIE AMBER-MESSICK, ADMINISTRATRIX OF THE ESTATE OF CHRISTOPHER KANGAS, DECEASED, PETITIONER

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are apprentice firefighters excluded from coverage under the provisions of the Public Safety Officers Benefit Act ("PSOBA") 42 U.S.C.S. §3796 et seq.

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Julie Amber Messick, in her capacity as Administratrix of the Estate of Christopher Kangas, deceased, respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit entered on April 17, 2007, denying benefits and recognition of the late Christopher Kangas as a "Firefighter" under the Public Safety Officers Benefits Act ("PSOBA"). A timely Petition for Rehearing and petition for Rehearing En Banc was denied on May 11, 2007 by the US Federal Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is dated April 17, 2007 and is published at 483 F.3rd 1316 (2007). (App. p. 1a to 22a). The opinion of the United States Federal Court of Claims is dated March 27, 2006 and the opinion can be found at 70 Fed. Cl. 319 (2006). (App. p. 23a to 50a). The denial of the Petition for Rehearing is dated May 11, 2007. (App. p. 51a to 52a). The final Agency decision in this matter is dated April 28, 2005. (App. p. 53a to 63a). The denial of the claim by Hearing Officer Douglas Dodge is dated April, 26, 2004. (App. p. 64a to 74a). The initial denial of the claim by the Bureau of justice Assistance ("BJA") is dated September 16, 2002. (App. p. 75a to 78a). All of these opinions and denials of the claim are found in the Appendix which is attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on April 17, 2007. A Petition for Rehearing and Petition for Rehearing En Banc was timely filed, and was denied on May 11, 2007. Pursuant to Supreme

Court Rule 13.1, this Petition has been filed within ninety (90) days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

RELEVANT PROVISIONS INVOLVED

42 U.S.C. § 3796(c) Interim benefit payment

> Whenever the Bureau determines upon showing of need and prior to final action that the death of a public safety officer is one with respect to which a benefit will probably be paid, the Bureau may make an interim benefit payment not exceeding $3,000 to the individual entitled to receive a benefit under subsection (a) of this section.

STATEMENT

Christopher Kangas, age fourteen (14), was an apprentice firefighter (also called a junior firefighter under PA Child Labor Laws, 43 PA. C.S. §48.3). Despite his young age, he was a full Active Member of the Brookhaven Volunteer Fire Department. He was killed in an accident when he was responding to an alarm on his bicycle and was struck by a motor vehicle.

His mother, Julie Amber Messick, the Petitioner herein, filed a claim under the PSOBA and also sought to recognize his memory by inscription of her son's name on the National Fallen Firefighters Foundation Monument in Emmitsburg, Maryland. The BJA denied her claim to benefits which also had the effect of denying his inscription onto the monument as PSOBA approval is a prerequisite to such listing.

The reason for the denial given by the BJA was that Christopher, as an apprentice firefighter, was not authorized to actively engage in the suppression of fires because of the restrictions found in the PA Child Labor Laws.

The PSOBA definition of firefighter states:

"Firefighter: includes an individual serving as an officially recognized or designated member of a legally organized fire department . . ."42 U.S.C. §3796 b (4). Volunteer firefighters, serving as needed and without compensation, are included. *Id.*, at §3796 b (8)(A) (a "public safety officer means . . . an individual serving a public agency in an official capacity, without compensation, as a law enforcement officer, as a firefighter, as a chaplain, or as a member of a rescue squad or ambulance crew").

The PSOBA is administered by the Department of Justice through its Bureau of Justice Assistance ("BJA"). The BJA held that Christopher Kangas was not a "firefighter" because of the restriction placed upon his activities at a fire scene by the PA Child Labor Laws (Firefighters under age sixteen (16) are prohibited from entering burning buildings and from climbing ladders or operating high-pressure hose lines other than during training).

Petitioner appealed the denial of her claim to the U.S. Federal Court of Claims. The Court of Federal Claims found that Kangas was a part of a firefighting team. At the hearing before the BJA, the Brookhaven Fire Chief, Rob Montella, testified as follows:

> "The junior firefighter is a - - it's part of a team. They are . . . just as much a part of being a firefighter as anybody else out there. They do all the jobs that they need to do. They help out. The jobs that they do are

very important. If they're not there, somebody else has to do the job. If you don't have the manpower them jobs aren't getting done. They're getting done by them other guys that are doing different jobs that they're allowed to do. So the junior firefighter is a vital part of the fire department."

This testimony was incorporated into the opinions of both Judge Horn (App. p. 26a) and by Judge Newman in her dissent. (App. p. 18a).

The United States appealed this reversal of the BJA's decision by Judge Horn to the U.S. Court of Appeals for the Federal Circuit which in a two (2) to one (1) decision reinstated the BJA's denial of the claim on the basis that Christopher Kangas was not a "firefighter" covered by the Act in that he was not "authorized to actively engage in the suppression of fires." (App. p. 13a).

From this decision, the Petitioner files this Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

1. The Denial of this Claim Would Discourage Future Recruitment of Firefighters, Which Contravenes the Statutory Purpose of the PSOBA.

Fourteen (14) year old Christopher Kangas, despite his apprentice status, was a "firefighter" whose death warranted both compensation and recognition under the provisions of the PSOBA. To deny him this status "contravenes the statutory purposes of the Act which according to the legislative history, included increasing the morale of fire departments assisting in recruiting efforts showing appreciation for public service officers, and alleviating economic and emotional burdens

placed upon public servants and their families." (See Judge Newman's dissent App. p. 19a). Such denial would also have the opposite effect of its statutory purposes in that it will have a chilling effect upon recruitment of "junior firefighters" which will then have a direct effect on the recruitment of Senior Firefighters. Getting started at a young age is the key to a lifetime of commitment to the nation's fire service.

In answer to Counsel's question regarding the percentage of firefighters who started out as "junior firefighters" before Hearing Officer Dodge, Chief Rob Montella of the Brookhaven Volunteer Fire Department stated as follows:

> A..."Approximately–I mean in our department alone I can tell you three quarters of our department started out as junior firefighters and every line officer in our fire department was a junior firefighter when they started from chief to captain to lieutenant to engineers to safety officers and every single person on there was a junior firefighter."

(App. p. 79a).

Obviously getting started as a young age is the key to a lifetime of commitment to the nation's fire service. Denying claims of "junior firefighters" will discourage recruitment.

2. The PSOBA's definition of "Firefighter" is not ambiguous.

The majority opinion in the U.S. Court of Appeals for the Federal Circuit accepted the argument of the United States that "Chevron deference" should be given to the interpretation of the BJA that the term "firefighter" in the PSOBA is ambiguous. Petitioner urges this Court to reject the majority opinion and agree with the dissent of Judge Newman, that the term "firefighter" in the Act is **not** ambiguous.

As Judge Newman stated in her dissent:

> "An interpretation that excludes apprentice firefighters who die while serving as apprentices, departs so markedly from the statutory purpose to negate deference." See Whitman v. American Trucking Ass'n, 531 U.S. 457, 485, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001) (judicial deference is not warranted where an agency "construe(d) the statute in a way that completely nullifies textually applicable provisions meant to limit [the agency's] discretion").

(App. p. 20a and 21a).

3. The PSOBA does not limit benefit eligibility according to duties performed, nor does the legislative history of the Act or words of the regulation.

Judge Horn of the U.S. Federal Court of Claims included the following in her Opinion:

> "The language of the PSOBA clearly does not limit death benefits eligibility according to duties performed at the scene of a fire; nor do the legislative history of the Act or the words of the regulations. None of these indicate that engaging in front-line activities is a component of "firefighting" or "suppression of fires." In 1975, when the statute was first drafted to include firefighters, the PSOBA was originally introduced as House Resolution 365, which defined "eligible firefighter" as one who was "actually and directly engaged in fighting a fire [.]" H.R. 365, 94th Cong. (1975). The Senate version of the bill, however, did not include this requirement, but described a "fireman" as "includ[ing] a person serving as an officially recognized or designated member of a legally organized volunteer

> fire department [.]" S. 2572, 94th Cong. (1975). Any language requiring a firefighter to be authorized to engage directly in the fighting of fires was omitted from the final version of the Act. (Footnote omitted). In fact, the Joint Explanatory Statement of the Conference Committee specifically chose to follow the Senate's description of "fireman" and authorized payment "for all line of duty deaths" and not just those sustained "while actually and directly engaged in fighting fires or in other activities determined by the Law Enforcement Assistance Administration to be potentially dangerous." H.R. Rep. No. 94-1501, at 5-6 (1976). The words of the statute and the regulations are easily understood without adding duty-specific limitations, which, contrary to any congressionally expressed intent, would eliminate some eligible "firefighters" from death benefits."

(App. p. 39a and 40a).

> Judge Newman also said in her dissent:
> " The PSOBA does not limit "firefighter" to exclude all persons who do not enter burning buildings. Observing various federal laws with firefighting provisions, the civil service law as to federal employees is explicit that a "firefighter" can be an administrator or supervisor who is not "actively engaged in the suppression of fires"–the definition adopted by my colleagues. See 5 U.S.C. section 8331(21). However according to the BJA's interpretation, an administrator or supervisor is not a "firefighter"."

(App. p. 21a).

4. The Majority Opinion in the Appeals Court decision is flawed in its legal basis by:

A. *Citing Legislative History of a version of a House Bill that was not passed.*

The majority opinion in the U.S. Court of Appeals for the Federal Circuit decision cited the House Judiciary Committee Report No. 94-1031 that contained a statement that coverage should extend to firemen who are "actually and directly engaged in fighting fires." (H.R. Rep. No. 94-1031, at 4 (1976)) The court relied upon the language in this Report as a basis for deciding that the BJA's interpretation of "firefighter" as one who is "authorized to actively engage in the suppression of fires" is a "permissible construction of the statute," and is not arbitrary and capricious.

This reliance is simply misplaced. The definition of a firefighter in the original House version of the Act (Firefighter's Benefit Act of 1975 (H.R. 365) included in its definition of "eligible firefighters" an individual "...actually and directly engaged in fighting a fire; or otherwise engaged in performance of his duty which the activity is determined by the Administration [LEAA, now BFA] to be potentially dangerous to the firefighter." See Cong. Rec. H. 3741, April 30, 1976. However, the Act as finally passed, deleted the requirement of "actually and directly engaged in fighting fires" and deleted the delegation to the LEAA , now BJA, to determine if the activity was dangerous. Its present definition of a "firefighter":

> "Includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department."

42 U.S.C. §3696 b (4).

Simply put, coverage under the Act as enacted does not require one to be actively involved in the suppression of fires or involved in potentially dangerous activities. A significant number of deaths covered by the Act each year involve firemen dying in accidents on their way to the firehouse in responding to an alarm, which is exactly how young Christopher Kangas died.

B. Citing Provisions of the PA. Administrative Code which have been superceded by the subsequent passage of the Child Labor Law statute.

The majority opinion included an impermissible reference to the provisions of 34 PA Code §11.67 (9) (5) which stated that minors were prohibited " . . and from riding an official vehicle to the scene of a fire and participating in any firefighting activities" as a basis for its conclusion "that BJA's decision, that Christopher was not "authorized to engage in the suppression of fires", was reasonable.

However, the Director of the BJA in his final decision had already conceded that 34 PA Code §11.67(a)(5) had been effectively repealed and superceded by the passage of the provision of the PA Child Labor Law found at 43 PA. Cons. Stat. §4813(c). (App. p. 63a). Therefore, apprentice firefighters, like Christopher Kangas, are permitted under PA state law to ride on official vehicles to the scene of a fire and are not prohibited from participation in firefighting activities.

Furthermore, even the restrictions of the present PA Child Labor Law for firefighters under age sixteen (16) do permit apprentice firefighters to be trained to operate high pressure hoses and be trained to ascend ladders and other dangerous activity. Under the BJA's present interpretation of the Act, a sixteen (16) years old firefighter trainee and member of a volunteer fire company would not be covered under the Act

if he died while being trained to perform hazardous firefighting activities. Clearly, this was not the intent or the purpose of the Act.

5. The Majority Opinion Ignores PA's recognition of Christopher Kangas as a "Firefighter."

Pennsylvania has an analogous statute to the Act. It is known as the PA Emergency Law Enforcement Personnel Death Benefits Act and is found at 53 P.S. §891 et seq. Both Acts (State and Federal) state that "this Act shall be broadly construed to grant benefits to firefighters . . . for deaths related to the performance of their duties." 53 P.S. §892.1. As was stated by Judge Newman in her dissent:

> "Under PSOBA regulation 28 C.F.R. §32.5, the BJA must give "substantial weight to evidence and finding of fact" presented by state and local agencies. Accordingly, when PA has recognized Christopher Kangas as a fallen firefighter under a statute with almost identical language to the federal statute, the United States should not take a contrary position without exceptional good reason. See 28 C.F.R. §32.4 ("[the BJA] shall resolve any reasonable doubt arising from the circumstances of the officer's death . . . in favor of the payment of the death . . . benefit"); Davis v. United States, 46 Fed. Cl. 421, 427 (2000). See also Demultiis v. United States, 48 Fed. Cl. 81 (2000). The PSOBA must be construed in accord with its legislative intent and applicable canons of construction "both of which compel a conclusion that Congress desired this statute to be applied liberally"), aff'd as modified 291 F.3d 1373 (Fed. Cir. 2002).

(App. p. 20a).

6. The Court of Federal Claims was correct that apprentice firefighters are covered by the PSOBA.

The U.S. Supreme Court is urged to adopt the conclusions of Judge Horn, who found that apprentice firefighters are within the statutory purposes and are covered by the Act:

> "In conclusion, Christopher was a recognized apprentice "firefighter" of the Brookhaven Volunteer Fire Department. He was authorized to attend to the scene of a fire, offload equipment, attach non-pressurized hoses to water sources, administer first aid to victims, assist in food services, roll hoses after a fire, remove debris, provide support at hazardous materials scenes and participate in search and rescue operations. Christopher engaged in activities involved in the "suppression of fires." He was a "firefighter" in the ordinary sense of the word." (App. p. 43a).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

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(any footnotes trail end of each document)
2006-5087
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JULIE AMBER-MESSICK, Administratrix of the Estate of Christopher Kangas, deceased,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

April 17, 2007, Decided

COUNSEL: Frank W. Daly, Daly & O'Brien, P.C., of Media, Pennsylvania, argued for plaintiff-appellee.

Nancy M. Kim, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With her on the brief were Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, and Todd M. Hughes, Assistant Director. Of counsel on the brief were Rafael A. Madan, General Counsel, and Gregory C. Brady, Deputy General Counsel, Office of Justice Programs, United States Department of Justice, of Washington, DC.

JUDGES: Before NEWMAN, SCHALL, and BRYSON, Circuit Judges. Opinion for the court filed by Circuit Judge SCHALL. Circuit Judge NEWMAN dissents.

OPINION BY: SCHALL

OPINION

SCHALL, Circuit Judge.

Julie Amber-Messick is the mother of Christopher Kangas, who was a fourteen-year old "apprentice firefighter" with the Brookhaven, Pennsylvania, Volunteer Fire Department ("Brookhaven Fire Department"). Following her son's death in a traffic accident, Mrs. Amber-Messick submitted a claim to the Department of Justice's Bureau of Justice Assistance ("BJA") seeking death benefits under the Public Safety Officers' Benefits Act of 1976 ("PSOBA" or "Act"), Pub. L. No. 94-430, 90 Stat. 1346 (codified as amended at 42 U.S.C. §§ 3796-3796c (2000)). After BJA denied her claim based on the conclusion that Christopher was not a "firefighter" under PSOBA, Mrs. Amber-Messick brought suit in the United States Court of Federal Claims. The parties then cross-moved for judgment based upon the administrative record.

The Court of Federal Claims granted judgment on the administrative record in favor of Mrs. Amber-Messick. The court ruled that BJA's denial of benefits was an arbitrary exercise of its authority and held that Mrs. Amber-Messick could recover under PSOBA because Christopher was a "firefighter" who had died "in the line of duty" within the meaning of the statute and implementing regulations. *Messick v. United States*, 70 Fed. Cl. 319, 332 (2006). Accordingly, the court entered judgment, awarding Mrs. Amber-Messick the sum of $ 250,000, adjusted in accordance with 42 U.S.C. § 3796(h). The United States has appealed the Court of Federal Claims' decision. Because we conclude that the court erred in failing to defer to BJA's interpretation of "firefighter," the judgment in favor of Mrs. Amber-Messick is reversed. The case is remanded to the Court of Federal Claims with the instructions that it enter judgment in favor of the United States and dismiss the complaint.

BACKGROUND

I.

PSOBA provides a one-time cash payment to survivors of public safety officers who die in the line of duty. The program is administered by BJA. In relevant part, section 3796(a) states:

In any case in which the Bureau of Justice Assistance . . . determines, under regulations issued pursuant to this part that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Bureau shall pay a benefit of $ 250,000 . . . as follows:

(1) if there is no surviving child of such officer, to the surviving spouse of such officer;

(2) if there is a surviving child or children and a surviving spouse, one-half to the surviving child or children of such officer in equal shares and one-half to the surviving spouse;

(3) if there is no surviving spouse, to the child or children of such officer in equal shares;

(4) if there is no surviving spouse or surviving child, to the individual designated by such officer as beneficiary under such officer's most recently executed life insurance policy, provided that such individual survived such officer; or

(5) if none of the above, to the parent or parents of such officer in equal shares.42 U.S.C. § 3796(a) (2000) (amended 2006).

For a survivor or survivors to be entitled to payment, the public safety officer must have suffered a "personal injury" within the meaning of the Act, the injury must have been

suffered "in the line of duty," and the death must have been "the direct and proximate result" of the personal injury. *Id.*; *see also Cassella v. United States*, 469 F.3d 1376, 1378 (Fed. Cir. 2006); *Yanco v. United States*, 258 F.3d 1356, 1359 (Fed. Cir. 2001). The 2000 version of the Act, applicable here, defined "public safety officer" as "an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, as a firefighter, as a chaplain, or as a member of a rescue squad or ambulance crew." 42 U.S.C. § 3796b(8) (2000) (current version at 42 U.S.C. 3796b(9) (2006)). The Act additionally defined "firefighter" as "includ[ing] an individual serving as an officially recognized or designated member of a legally organized volunteer fire department." 42 U.S.C. § 3796b(4) (2000 & Supp. II 2002).

The Act also sets forth specific restrictions upon entitlement. Section 3796a states in pertinent part:

No benefit shall be paid under this subchapter—

(1) if the death or catastrophic injury was caused by the intentional misconduct of the public safety officer or by such officer's intention to bring about his death or catastrophic injury;

. . . .

(3) if the public safety officer was performing his duties in a grossly negligent manner at the time of his death or catastrophic injury.42 U.S.C. § 3796a (2000).

II.

Christopher Kangas was a fourteen-year-old "apprentice firefighter" with the Brookhaven Fire Department. *Messick*, 70 Fed. Cl. at 321. The Brookhaven Fire Department

authorized fourteen- and fifteen-year old apprentice firefighters to participate in training activities; to provide first aid care to victims at emergency scenes; to engage in canteen (food service) activities; to participate in a support capacity in connection with search and rescue operations, wild fires, hazardous materials incidents, and water supply operations; and to assist with clean-up activities, such as rolling hoses, putting away portable tools, and removing debris outside of fire buildings and collapse zones. Christopher, who had been an apprentice firefighter since May 15, 2001, was issued official firefighting equipment and had completed 58.5 hours of in-house training in a variety of areas related to firefighting. *Id.*

On May 4, 2002, an automobile struck Christopher at an intersection. At the time of the accident, Christopher was riding his bicycle from his house to the Brookhaven fire station in response to a fire alarm. *Id.* at 321-22. As a result of the accident, Christopher sustained serious injuries and died. *Id.* at 322. According to the November 20, 2002 report of the National Institute for Occupational Safety and Health ("NIOSH"), Christopher was not wearing a helmet and crossed the intersection without stopping at the stop sign.

III.

On May 28, 2002, Mrs. Amber-Messick filed a claim with BJA for PSOBA death benefits. *Id.* at 321. On September 11, 2002, BJA issued an initial determination denying the claim. *Id.* BJA determined that Christopher "was a trainee but did not possess authority to act as an official firefighter" and thus was not a "public safety officer" pursuant to PSOBA. *Id.* BJA noted that Christopher was only permitted to participate in training activities, to provide first aid care, to assist with clean-up activities, to support canteen activities, and to participate in a support capacity for operations such as searches and rescues. BJA also noted that Christopher "was

not permitted to operate equipment or assist with fire suppression at fire scenes or enter hazardous atmospheres." *Id.*

On March 4, 2003, Mrs. Amber-Messick sought reconsideration of the initial denial of benefits. *Id.* In accordance with BJA regulations, the matter was referred to a Hearing Officer, who received evidence and held a hearing. n1 In his April 26, 2004 decision, the Hearing Officer sustained the initial denial of benefits based on his conclusion that Christopher was not a "firefighter" under PSOBA. *Id.* at 322. The Hearing Officer acknowledged that PSOBA did not define "firefighter" as one "engaged in the suppression of fires," but concluded that Congress intended the term "firefighter" to mean an individual "authorized to actively engage in the suppression of fires." *Id.* The Hearing Officer based his conclusion on the plain meaning of the term "firefighter" n2 as well as his interpretation of legislative intent. n3 *Id.* Additionally, the Hearing Officer cited to the definition of "line of duty" in BJA's implementing regulations n4 to support his conclusion that one must be authorized to fight or suppress fires to be a "firefighter" under the statute. *Id.* The Hearing Officer also noted that under Pennsylvania law, n5 fourteen- and fifteen-year old junior firefighters are prohibited from being directly involved in the suppression of fires. *Id.*

On June 29, 2004, in accordance with 28 C.F.R. 32.24(i)(1)(i), Mrs. Amber-Messick requested that BJA reconsider the Hearing Officer's denial of death benefits. *See* 28 C.F.R. § 32.24(i)(1) (2002) ("A claimant determined ineligible by a hearing officer . . . may, within 30 days after notification of the hearing officer's determination: (i) request the BJA Director to review the record and the hearing officer's determination . . . .") (current version at 28 C.F.R. § 32.46 (2006)). On April 28, 2005, the Director of BJA, in the Final Agency Decision, affirmed the Hearing Officer's denial

of benefits based on the conclusion that Christopher was not a "firefighter" or "public safety officer" within the meaning of PSOBA. Id. at 323. The Director additionally concluded that "[e]ven if Christopher were a 'firefighter' within the meaning of the PSOB Act (which he was not), his tragic death did not occur in the line of duty, as defined in the PSOB regulations, because Pennsylvania law . . . did not obligate or authorize him to engage in fire-fighting or fire-suppression activity." *Id.*

IV.

On June 27, 2005, Mrs. Amber-Messick filed a complaint in the Court of Federal Claims to challenge BJA's denial of her claim under PSOBA. n6 As noted above, the parties, in due course, cross-moved for judgment based upon the administrative record. The court concluded that BJA's denial of death benefits was "arbitrary and capricious and founded on an unreasonably restrictive reading of the words of PSOBA and implementing regulations." *Id.* at 331. The court found that Christopher was a "firefighter" who died in the "line of duty" because Christopher's "'primary function' was to be a part of the team that engaged in 'the suppression of fires.'" *Id.* The court therefore granted Mrs. Amber-Messick's motion for judgment on the administrative record and denied the government's cross-motion. *Id.* at 332.

The United States timely appealed the judgment of the Court of Federal Claims to this court on May 26, 2006. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

I.

Our review of BJA's denial of a claim for death benefits is limited to three inquiries: (1) whether there has been

substantial compliance with statutory requirements and provisions of implementing regulations; (2) whether there has been any arbitrary or capricious action on the part of the government officials involved; and (3) whether substantial evidence supports the decision denying the claim. *Yanco*, 258 F.3d at 1362; *Chacon v. United States*, 48 F.3d 508, 511 (Fed. Cir. 1995). We review the judgment of the Court of Federal Claims de novo, applying this deferential standard anew. *Greeley v. United States*, 50 F.3d 1009, 1010-11 (Fed. Cir. 1994).

The government argues on appeal that we should defer to BJA's permissible construction of "firefighter" in line with *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The government contends that because the term "firefighter" is ambiguous with respect to whether it covers a minor apprentice firefighter, we must inquire, under step two of the *Chevron* analysis, whether BJA's conclusion that Christopher was not a firefighter because he was not authorized to fight fires was reasonable. According to the government, BJA's interpretation of "firefighter" was permissible in light of Pennsylvania state law; the ordinary, common meaning of the term; and the legislative history of PSOBA.

Additionally, the government makes two alternative arguments. First, the government argues that even if Christopher was a "firefighter" pursuant to PSOBA, BJA's interpretation of "line of duty" is reasonable and therefore we should uphold its determination that Christopher did not die in the "line of duty." Second, the government contends that even if Christopher was a "firefighter" who died in the "line of duty," the government is entitled to a remand of the case for a determination by BJA as to whether the circumstances of Christopher's death--his failure to wear a helmet and to stop before entering the intersection--constituted intentional

misconduct or gross negligence so as to preclude the payment of a benefit under the statute. *See* 42 U.S.C. § 3796a.

In response to the government's arguments, Mrs. Amber-Messick argues that PSOBA is clear and unambiguous in its broad definition of "firefighter." Further, she contends that even if the term "firefighter" is ambiguous, BJA's interpretation of the term is arbitrary and capricious, given that the statute and regulations are easily understood without adding duty-specific limitations. Mrs. Amber-Messick also directs our attention to the fact that she received benefits under the Pennsylvania Emergency Law Enforcement Personnel Death Benefits Act, 53 Pa. Stat. Ann. § 891, as support for her argument that she should have received benefits under PSOBA. Specifically, Mrs. Amber-Messick argues that 28 C.F.R. § 32.5 n7 requires BJA to give "substantial weight" to state and local agencies' findings.

With respect to the government's "line of duty" alternative argument, Mrs. Amber-Messick contends that because Christopher's primary function was to be a part of a team that engaged in the "suppression of fires," Christopher died in the "line of duty." Finally, Mrs. Amber-Messick urges that there are three reasons why we should reject the government's request for a remand. First, she notes that, under 28 U.S.C. § 1491(a)(2), n8 the lower court's decision whether to remand is discretionary. Second, she contends that the record contains insufficient evidence to support a determination of intentional misconduct or gross negligence, given that the NIOSH report is the only item in the record that mentions Christopher's failure to wear a helmet and to stop at the stop sign. Third, Mrs. Amber-Messick argues that the failure to wear a helmet and to stop at the stop sign does not rise to the level of intentional misconduct or gross negligence.

II.

We hold that the Court of Federal Claims erred in granting judgment on the administrative record in favor of Mrs. Amber-Messick and in denying judgment on the administrative record in favor of the United States. We agree with the government's argument that BJA's construction of the term "firefighter" is permissible.

In *United States v. Mead Corp.*, the Supreme Court explained that:

[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.533 U.S. 218, 226, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). The Supreme Court further noted, "We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." Id. at 229. Here, because Congress expressly authorized BJA to issue regulations interpreting PSOBA and to make determinations as to eligibility for benefits, we conclude that Congress intended for a BJA pronouncement to have the "force of law." *See* 42 U.S.C. § 3796c ("The Bureau is authorized to establish such rules, regulations, and procedures as may be necessary to carry out the purposes of this subchapter."). We therefore will defer to BJA's interpretation of "firefighter," so long as it is reasonable in accordance with *Chevron*.

When *Chevron* deference applies, the court must undertake a two-step inquiry. First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Here, the "precise question at issue" is whether the term "firefighter" in 42 U.S.C. § 3796b(4) covers a minor prohibited by law from engaging in certain firefighting activities. In that regard, we are not persuaded by Mrs. Amber-Messick's argument that PSOBA is clear and unambiguous in its broad definition of "firefighter." Mrs. Amber-Messick argues that neither the statute nor the regulations supply age or duty requirements or add other limitations to the definition of "firefighter." We think, however, that this argument indicates Congress has *not* directly spoken to the precise question of whether the term "firefighter" covers a minor apprentice firefighter. We also think Mrs. Amber-Messick's argument that the drafters of PSOBA chose to use "includes" rather than "means" or "is defined" in the definition of "firefighter," 42 U.S.C. § 3796b(4), n9 because they intended for PSOBA to have a broader interpretation fails. In our view, Congress used the word "includes" in order to ensure that the Act covered volunteer firefighters as well as professional firefighters. H.R. Rep. No. 94-1031, at 4 (1976) ("The bill defines 'firemen' to include volunteer as well as professional firemen."). If Congress had defined "firefighter" to "mean an individual serving as an officially recognized or designated member of a legally organized volunteer fire department," professional firefighters would have been excluded from statutory coverage. Accordingly, we conclude that Congress

has not "directly spoken" to the question of whether the term "firefighter" in 42 U.S.C. § 3796b(4) covers a minor apprentice firefighter prohibited by law from engaging in certain firefighting activities.

Under the second prong of the *Chevron* analysis, we must determine whether BJA's decision to exclude from the definition of "firefighter" a minor apprentice firefighter not authorized to fight fires represents "a permissible construction of the statute." *Chevron*, 467 U.S. at 843. We conclude that BJA's interpretation of "firefighter" as one who is "authorized to actively engage in the suppression of fires" is permissible based on the ordinary meaning of the term "firefighter" as well as the legislative history of the Act.

The ordinary, common meaning of the term "firefighter" as "a person who fights fires" is consistent with BJA's interpretation of "firefighter." *See Merriam-Webster's Collegiate Dictionary* (10th ed. 2002); *see also The New Shorter Oxford English Dictionary* (1993) ("a person whose task is to extinguish fires"); *Webster's Third New Int'l Dictionary* (1981) ("one who fights fires"). We agree with the government's argument that there is no indication in the Act itself of any legislative intent to depart from this ordinary meaning. The legislative history, moreover, supports BJA's interpretation of the term "firefighter" in accordance with its ordinary meaning. The House Judiciary Committee Report No. 94-1031 contains the following statement: "Since fire fighting has been determined to be one of the most hazardous professions, the Committee is of the opinion that coverage should extend to all activities performed by firemen when they are actually and directly engaged in fighting fires." H.R. Rep. No. 94-1031, at 4 (1976). We thus conclude that BJA's interpretation of the term "firefighter" as one who is "authorized to actively engage in the suppression of fires" is a "permissible construction of the statute," and is not, as argued by Mrs. Amber-Messick, arbitrary and capricious.

Based on our conclusion that BJA's interpretation of "firefighter" is permissible, the only remaining question is whether BJA's decision that Christopher is not "authorized to actively engage in the suppression of fires" and therefore not a "firefighter" pursuant to PSOBA is reasonable. According to Pennsylvania state law, as a minor under sixteen years of age, Christopher's activities were expressly limited to: (1) training, (2) first aid, (3) clean-up, and (4) providing coffee wagon and food services. 43 Pa. Cons. Stat. § 48.3(c). The authorization to engage in these limited activities does not equate to the authorization "to actively engage in the suppression of fires." Further, given that Pennsylvania state law prohibits minors under the age of sixteen from operating high pressure hose lines except during training, from ascending ladders except during training, from entering a burning structure, 43 Pa. Cons. Stat. § 48.3(c), and from riding an official vehicle to the scene of a fire and participating in any fire fighting activities, 34 Pa. Code § 11.67(a)(5), we conclude that BJA's decision that Christopher was not "authorized to engage in the suppression of fires" was reasonable.

Additionally, we find unpersuasive Mrs. Amber-Messick's contention that the fact she received benefits under the Pennsylvania Emergency Law Enforcement Personnel Death Benefits Act supports her claim under PSOBA. BJA's implementing regulation, 28 C.F.R. § 32.5, only applies to findings of fact and does not apply to the ultimate conclusion of whether a claimant is entitled to a benefit. n10 *See Demutiis v. United States,* 291 F.3d 1373, 1379 (Fed. Cir. 2002). BJA was not required to give "substantial weight" to the state agency's legal conclusion that Mrs. Amber-Messick was entitled to receive death benefits under state law.

In sum, we hold that BJA's interpretation of the term "firefighter" as one who is "authorized to actively engage in the suppression of fires" is permissible in light of the

ordinary, common meaning of the term "firefighter" and the legislative history of PSOBA. We also hold that BJA did not err in its determination that Christopher was not a "firefighter" under PSOBA, given that Pennsylvania state law does not authorize him to participate in firefighting activities and, instead, expressly limits his activities to non-firefighting activities.

Finally, in view of our disposition of the appeal based upon our holding that Christopher was not a "firefighter" pursuant to PSOBA, we do not need to reach the government's two alternative arguments noted above.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims in favor of Mrs. Amber-Messick is reversed. The case is remanded to the Court of Federal Claims, which is instructed to enter judgment in favor of the United States and to dismiss the complaint.

COSTS

Each party shall bear its own costs.

REVERSED and *REMANDED*

Footnotes

fn1"A claimant may, within thirty (30) days after notification of ineligibility by the Bureau, request the Bureau to reconsider its finding of ineligibility. The Bureau shall provide the claimant the opportunity for an oral hearing which shall be held within 60 days after the request for reconsideration." 28 C.F.R. § 32.24(a) (2002) (current version at 28 C.F.R. § 32.29 (2006)).

fn2The Hearing Officer cited *Webster's Dictionary* (10th ed.) for the definition of "firefighter" as a "person who fights fires." *Messick*, 70 Fed. Cl. at 322.

fn3The Hearing Officer stated that "[t]his plain meaning of 'firefighter' was apparently so obvious that Congress did not bother to add any further definition." The Hearing Officer further explained that:

The original House Bill for the Firefighters Benefits Act of 1975 (H.R. 365), which later evolved into the PSOB Act of 1976, included in its definition of "eligible firefighter" an individual ". . . actually and directly engaged in fighting a fire; or otherwise engaged in performance of his duty where the activity is determined by the Administration [LEAA] to be potentially dangerous to the firefighter." *See* Cong. Rec. H 3741, Apr. 30, 1976.

fn428 C.F.R. § 32.2(c)(1) defines "line of duty" as "any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulations, condition of employment or service, or law to perform." 28 C.F.R. § 32.2(c)(1) (2002) (current version at 28 C.F.R. § 32.3 (2006)).

fn5The Pennsylvania Administrative Code expressly prohibits fourteen- and fifteen-year olds from "(i) Rid[ing] an official vehicle to the scene of a fire[,] (ii) Participat[ing] in any fire fighting activities." 34 Pa. Code § 11.67(a)(5).

Additionally, the Pennsylvania Child Labor Law expressly limits minors under sixteen years of age to the following activities: "(1) Training[;] (2) First aid[;] (3) Clean-up service at the scene of a fire, outside the structure, after the fire has been declared by the fire official in charge to be under control[;] (4) Coffee wagon and food services." 43 Pa. Cons.

Stat. § 48.3(b). The Pennsylvania Child Labor Law further explicitly prohibits minors under sixteen years of age from "(1) Operat[ing] high pressure hose lines, except during training activities; (2) Ascend[ing] ladders, except during training activities; or (3) Enter[ing] a burning structure." 43 Pa. Cons. Stat. § 48.3(c).

fn6The Court of Federal Claims had jurisdiction over the suit under the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000).

fn7The regulation states:

The Bureau will give substantial weight to the evidence and findings of fact presented by State, local, and Federal administrative and investigative agencies. The Bureau will request additional assistance or conduct its own investigation when it believes that the existing evidence does not provide the Bureau with a rational basis for a decision on a material element of eligibility.28 C.F.R. § 32.5.

fn8Section 1491(a)(2) provides in relevant part: "[The Court of Federal Claims] shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." 28 U.S.C. § 1491(a)(2).

fn9As noted above, the statute states that the term firefighter "includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department." 42 U.S.C. § 3796b(4).

fn10As noted, the regulation states in pertinent part that BJA "will give substantial weight to the evidence and findings of fact presented by State, local, and Federal administrative and investigative agencies." 28 C.F.R. § 32.5.

DISSENT BY: NEWMAN

DISSENT

NEWMAN, *Circuit Judge*, dissenting.

Christopher Kangas, age 14, was an apprentice firefighter, also called a junior firefighter, at Brookhaven Fire Department No. 1. He was killed in an accident on his bicycle while responding to a fire call. His family requested the statutory compensation that is granted, in accordance with the Public Safety Officers' Benefits Act (PSOBA), to families of firefighters and other public safety officers who die in the line of duty. The family also sought to recognize his memory by inscription on the National Fallen Firefighters Foundation's Honor Roll of firefighters who die in service; this recognition was denied after the government denied firefighter benefits under the PSOBA.

The PSOBA definition states: "'Firefighter' includes an individual serving as an officially recognized or designated member of a legally organized fire department . . . ." 42 U.S.C. § 3796b(4). Volunteer firefighters, serving as needed and without compensation, are included. *Id.* at § 3796b(8)(A) (a "'public safety officer' means . . . an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, as a firefighter, as a chaplain, or as a member of a rescue squad or ambulance crew").

The PSOBA is administered by the Department of Justice through its Bureau of Justice Assistance (BJA). The BJA held that Kangas was not a "firefighter" because as a junior firefighter under the age of 16 he could not, in accordance with Pennsylvania law, engage in certain firefighting activities. Firefighters under the age of sixteen are prohibited, in Pennsylvania, from entering burning buildings and from climbing ladders or operating high-pressure hose lines other than during training.

The Court of Federal Claims, reviewing the testimony of Pennsylvania firefighting officials, agreed with these officials that Kangas was part of the firefighting team. At the hearing before the BJA, the Brookhaven Fire Chief, Rob Montella, testified as follows:

The junior firefighter is a--it's part of the team. They are . . . just as much a part of being a firefighter as anybody else out there. They do all the jobs that they need to do. They help out. The jobs that they do are very important. If they're not there, somebody else has to do the job. If you don't have the manpower them jobs aren't getting done. They're getting done by them other guys that are doing different jobs that they're allowed to do. So the junior firefighter is a vital part of the fire department.The Pennsylvania State Fire Commissioner also testified, stating that the Pennsylvania death benefits statute makes no distinction between junior/apprentice firefighters and other firefighters who die in the line of duty, and that Kangas had been so recognized and placed on the state's Honor Roll of fallen firefighters. The Fire Commissioner testified that the state death benefits statute makes no distinction among junior, apprentice, or other firefighters and that age or service capacity are not barriers to state death benefits.

The Court of Federal Claims observed that the federal statute does not exclude apprentice firefighters who die under conditions in which a non-apprentice would be recognized.[1] The testimony of the Brookhaven Fire Chief and Pennsylvania Fire Commissioner was clear that the duties performed by the apprentice firefighters freed the senior firefighters for other tasks, and that the apprentices' tasks are a necessary and integral part of the team effort in fighting fires.

The Court of Federal Claims summarized the evidence as follows:

Christopher had been issued official firefighter equipment. He had completed 58.5 hours of in-house training and had trained in twenty-two different areas related to firefighting, including rescue operations, the functions of an air pack, electronics, carbon monoxide detection and hose rolling. Christopher also was certified in CPR and had responded to twenty-four house drills. The Brookhaven Fire Department had authorized Christopher to be part of the firefighting team by participating at the scene of a fire, including bringing out portable equipment and fire hoses, providing food, drink and first aid to the other firefighters, and cleaning up after fires that were under control. After Christopher's death, the Brookhaven, Pennsylvania, Volunteer Fire Department added his name to the honor roll of its deceased members. Christopher was the only person on the honor roll to have died in what the Department determined was "the line of duty." 70 Fed. Cl. at 321. The Court concluded that Kangas' service was within the scope of the PSOBA, whose purpose was to encourage and recognize persons who formally participate in public safety activities.

On appeal by the United States, my colleagues now endorse the federal government's position that Christopher Kangas was not a "firefighter" and that his death warrants neither compensation nor recognition. This position contravenes the statutory purposes, summarized in the legislative history as including increasing the morale of fire departments, assisting in recruiting efforts, showing appreciation for public service officers, and alleviating economic and emotional burdens placed upon public servants and their families. The Senate Committee Report accompanying amendments in 2000 explained that the national goal "to reduce loss of life and property and protect the nation's critical infrastructure from all types of hazards, through a comprehensive, risk-based emergency management program . . ." with a broad mission focusing on four areas: preparedness (*e.g.*, emergency planning and training), mitigation, response, and recovery. S.

Rep. 106-295 (2000) at 1-2, the Disaster Mitigation Act of 2000, 114 Stat. 1552, Pub. L. No. 106-390. My colleagues' reliance on Christopher Kangas' exclusion from some senior firefighting activities as the basis for barring his recognition as a fallen firefighter is in direct conflict with the statutory purpose of recognizing the role of the firefighter and others serving the public.

The analogous Pennsylvania Emergency Law Enforcement Personnel Death Benefits Act, 53 P.S. § 891 et seq. states, as does the PSOBA, that: "This Act shall be broadly construed to grant benefits to firefighters . . . for deaths related to the performance of their duties." 53 P.S. § 892.1. Under PSOBA regulation 28 C.F.R. § 32.5 the BJA must give "substantial weight to evidence and findings of fact" presented by state or local agencies. Accordingly, when Pennsylvania has recognized Christopher Kangas as a fallen firefighter under a statute with almost identical language to the federal statute, the United States should not take a contrary position without exceptional good reason. *See* 28 C.F.R. § 32.4 ("[the BJA] shall resolve any reasonable doubt arising from the circumstances of the officer's death . . . in favor of the payment of the death . . . benefit"); *Davis v. United States*, 46 Fed. Cl. 421, 427 (2000). *See also Demutiis v. United States*, 48 Fed. Cl. 81 (2000) (the PSOBA must be construed in accord with its legislative intent and applicable canons of construction "both of which compel a conclusion that Congress desired this statute to be applied liberally"), *aff'd as modified*, 291 F.3d 1373 (Fed. Cir. 2002).

Although the United States urges *Chevron* deference to the interpretation of the BJA, the term "firefighter" in the PSOBA is not ambiguous. An interpretation that excludes apprentice firefighters who die while serving as apprentices, departs so markedly from the statutory purpose as to negate deference. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 485, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001)

(judicial deference is not warranted where an agency "construe[d] the statute in a way that completely nullifies textually applicable provisions meant to limit [the agency's] discretion").

The PSOBA does not limit "firefighter" to exclude all persons who do not enter burning buildings. Observing the various federal laws with firefighter provisions, the civil service law as to federal employees is explicit that a "firefighter" can be an administrator or supervisor who is not "actively engaged in the suppression of fires"--the definition adopted by my colleagues. *See* 5 U.S.C. § 8331(21). However, according to the BJA's interpretation, an administrator or supervisor is not a "firefighter."

The Court of Federal Claims correctly concluded that apprentice firefighters are within the statutory purposes and entitled to the death benefits of the PSOBA:

In conclusion Christopher was a recognized apprentice "firefighter" of the Brookhaven Volunteer Fire Department. He was authorized to attend the scene of a fire, offload equipment, attach non-pressurized hoses to water sources, administer first aid to victims, assist in food services, roll hoses after a fire, remove debris, provide support at hazardous materials scenes and participate in search and rescue operations. Christopher engaged in activities involved in the "suppression of fires." He was a "firefighter" in the ordinary sense of the word. 70 Fed. Cl. at 331. The exclusion of apprentices who are killed in the line of duty is inimical to the purpose of this statute that was designed to encourage and enlarge such public service. The PSOBA "should not be applied grudgingly, but rather should be construed liberally to avoid frustration of its beneficial legislative purposes." *Bice v. United States,* 72 Fed. Cl. 432 (2006). *See Baltimore & Philadelphia S.B. Co. v. Norton,* 284 U.S. 408, 414, 52 S. Ct. 187, 76 L. Ed. 366 (1932) (remedial laws "are deemed to

be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results") (citations omitted).

Logic and justice add their weight to the plain reading of this statute. The federal restriction of "firefighter" to exclude apprentices who die in the line of duty is untenable, and in striking contrast to Pennsylvania's recognition of the death of such apprentices. From my colleagues' endorsement of this statutory interpretation I must, respectfully, dissent.

Footnote

fn1It is undisputed that accidental death while traveling to or from a fire is deemed compensable; indeed, a large number of such unfortunate accidents occur. "According to the U.S. Fire Administration, of the 106 fire fighters who died in the line of duty in 2005, 26 were the result of vehicle accidents." http://*www.iaff.org/media/021506health.pdf.*

No. 05-697C

UNITED STATES COURT OF FEDERAL CLAIMS

JULIE AMBER MESSICK, Administratrix, Estate of Christopher Kangas, Deceased,
Plaintiff,

v.

UNITED STATES,
Defendant.

March 27, 2006, Filed

COUNSEL: Frank W. Daly, Daly, Gorbey & O'Brien, P.C., Media, Pennsylvania, for plaintiff.

Nancy M. Kim, Trial Attorney; Todd M. Hughes, Assistant Director; David M. Cohen, Director; Peter D. Keisler, Assistant Attorney General, Department of Justice, Washington, DC, for defendant. Gregory C. Brady, Deputy General Counsel, Office of Justice Programs, of counsel.

JUDGES: MARIAN BLANK HORN, Judge.

OPINION BY: MARIAN BLANK HORN

OPINION

HORN, J.

Plaintiff, Julie Amber Messick, upon behalf of her deceased son, Christopher Nicholas Kangas, filed for death benefits pursuant to the Public Safety Officers' Death Benefits Act, Omnibus Crime Control and Safe Streets Act of

1968, § 1201, as amended, *42 U.S.C. §§ 3796-3796c (2000 & Supp. II 2002)* (PSOBA).

FINDINGS OF FACT

This case involves the tragic and untimely death of Christopher Nicholas Kangas, a volunteer apprentice firefighter, also known as a volunteer junior firefighter, for the Brookhaven, Pennsylvania, Volunteer Fire Department. On May 4, 2002, Christopher was riding his bicycle to the fire station in response to a fire alarm when he was struck by an automobile. He sustained serious injuries, including head trauma, and was flown to Children's Hospital in Philadelphia, where he died from his injuries the next day. He was fourteen years old.

In a Joint Stipulation of Facts submitted to the court, the parties have stipulated that at the time of his death, Christopher was "an officially recognized member of the Brookhaven, Pennsylvania Volunteer Fire Department, and was serving as an 'apprentice firefighter.'" Moreover, according to Brookhaven, Pennsylvania, Fire Chief Rob Montella:

> The junior firefighter is a - it's part of the team. They are just as part - just as much as a part of being a firefighter as anybody else out there. They do all the jobs that they need to do. They help out. The jobs that they do are very important. If they're not there, somebody else has to do the job. If you don't have the manpower them jobs aren't getting done. They're getting done by them other guys that are doing different jobs that they're allowed to do. So the junior firefighter is a vital part of the fire department.

Christopher had been issued official firefighter equipment. He had completed 58.5 hours of in-house training and had trained in twenty-two different areas related to firefighting, including rescue operations, the functions of an air pack, electronics, carbon monoxide detection and hose rolling. Christopher also was certified in CPR and had responded to twenty-four house drills. The Brookhaven Fire Department had authorized Christopher to be part of the firefighting team by participating at the scene of a fire, including bringing out portable equipment and fire hoses, providing food, drink and first aid to the other firefighters, and cleaning up after fires that were under control. After Christopher's death, the Brookhaven, Pennsylvania, Volunteer Fire Department added his name to the honor roll of its deceased members. Christopher was the only person on the honor roll to have died in what the Department determined was "the line of duty."

On May 28, 2002, Julie Amber Messick, Christopher's mother, filed a claim with the Bureau of Justice Assistance (BJA), for death benefits under the PSOBA. On September 11, 2002, after a review of her claim, the BJA issued an initial determination denying Mrs. Amber Messick's claim for benefits. In that initial determination, he BJA recognized that Christopher was an "Apprentice Volunteer Firefighter" and was authorized to:

> participate in training activities, provide first aid care to victims at emergency scenes, and assist with clean-up activities such as rolling hose, putting away portable tools, and removing debris under supervision of the officer in charge and outside of fire buildings and collapse zones. He was allowed to provide canteen (food service) activities and participate in a support capacity for searches, rescues, wild fires,

hazardous materials incidents, and water supply operations.

However, according to the BJA determination, Christopher "was not permitted to operate equipment or assist with fire suppression at fire scenes or enter hazardous atmospheres." The BJA determined that "Apprentice VFF Kangas was a trainee but did not possess authority to act as an official firefighter." Accordingly, the BJA found that Christopher was not a "public safety officer" as defined in *42 U.S.C. § 3796b(8)* [1] and that, therefore, the claimant was ineligible to receive PSOB death benefits.

On March 4, 2003, Mrs. Amber Messick appealed the BJA's initial determination. The BJA subsequently held an appeal hearing on January 22, 2004. After reviewing the documents submitted and the testimony offered by the witnesses, the Hearing Officer issued a decision on April 26, 2004, sustaining the BJA's initial determination and confirming the denial of death benefits to the claimant. The Hearing Officer made the following findings of fact:

1. On May 4, 2002, Christopher Kangas was responding to a fire call on his bicycle and he was struck by a car. He subsequently died from the injuries sustained in this accident.

2. On that date Kangas was a junior (apprentice) firefighter with the Brookhaven, Pennsylvania VFD.

3. Junior firefighter Kangas had been an active member of the volunteer fire company since May 15, 2001, when he was voted in by the Brookhaven FVD Association. He had received at least 58.5 hours of training at the time of his death. He had been issued gear and went on numerous fire calls.

4. Junior firefighter Kangas was permitted . . . [2] to ride to fires on the fire truck. He was also allowed to perform various activities at the scene of the fire, including off-loading equipment, attaching non-pressurized hoses to a water source, administering first aid to victims, assisting with the canteen for the line firefighters, cleaning up (rolling hoses) and removing of debris under supervision of the fire commander. He could provide support at hazardous materials scenes but he could not participate in dealing with the hazardous materials. He could also participate in search and rescue operations.

5. Junior Firefighter Kangas was not permitted by Pennsylvania statute (*43 P.S. § 48.3*) and fire company regulations to operate heavy equipment, pressure hoses of any kind, ascend ladders, enter burning buildings or fire or hazardous materials zones; all of which are fundamental fire suppression activities.

The Hearing Officer concluded that Christopher was not a "firefighter" as defined in the PSOBA. [3] As is discussed more fully below, the Hearing Officer acknowledged that the PSOBA did not define "firefighter" as one "engaged in the suppression of fires." The Hearing Officer noted that the original regulations implementing the Act had contained this language, but "for unknown reasons," the language had been removed in 1985. Despite the absence of this language ("engaged in the suppression of fires") in the PSOBA, and the removal of that same language from the implementing regulations' definition of "firefighter," the Hearing Officer still concluded that an "individual must be authorized to actively engage in the suppression of fires to be a "firefighter" under the Act." The Hearing Officer apparently did so based on his own reading of the legislative intent and

what he concluded was the plain or ordinary meaning of the word "firefighter," as a "'person who fights fires,'" for which he cited WEBSTER'S DICTIONARY (10th ed.). The Hearing Officer stated that Congress intended the word "firefighter" to be one who is "authorized to fight fires."

The Hearing Officer also cited to the definition of "line of duty" in the regulations issued pursuant to the PSOBA, which states:

> Any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulations, condition of employment or service, or law to perform . . . .

28 C.F.R. § 32.2(c)(1) (2002).

In addition, the Hearing Officer relied on a Pennsylvania Statute-the Pennsylvania Child Labor Law, *43 PA. CONS. STAT. ANN. § 48.3-as* limiting the ability of junior firefighters to engage in certain activities at the scene of the fires and, therefore, limiting Christopher's ability to engage in the "suppression of fires." Consequently, the Hearing Officer denied Mrs. Amber Messick's claim and concluded that Christopher was not a firefighter who died in the line of duty because "one cannot be acting in the line of duty' unless he or she is authorized to be engaged in the suppression of fires-in other words, to be a firefighter."

On June 29, 2004, Mrs. Amber Messick requested the BJA to reconsider the Hearing Officer's determination. On April 28, 2005, after reviewing the record, the Director of the BJA issued a Final Agency Decision, affirming the Hearing Officer's determinations and denying death benefits to the claimant. In the decision, the Director affirmed the denial of the claim, based on the conclusion that Christopher was not a

public safety officer or a "firefighter" within the meaning of the PSOBA and the implementing regulations. Furthermore, the Director wrote: "Even if Christopher were a 'firefighter' within the meaning of the PSOB Act (which he was not), his tragic death did not occur in the line of duty, as defined in the PSOB regulations, because Pennsylvania law (discussed above) did not obligate or authorize him to engage in fire-fighting or fire-suppression activity."

On June 27, 2005, Mrs. Amber Messick filed a complaint in this court, seeking review of the BJA's determination. In her complaint, plaintiff states that the BJA improperly denied her benefits since it was undisputed that Christopher was serving as an officially recognized member of the Brookhaven Volunteer Fire Department at the time of his death. Further, plaintiff claims that the BJA "exceeded its regulatory powers by promulgating regulations that impermissibly narrow the definition of 'firefighter' to require that the claimant 'engaged in the suppression of fires . . . .'"

On September 16, 2005, in response to plaintiff's complaint, defendant filed a motion for judgment upon the administrative record. In the motion, defendant states that Congress demonstrated no intent to depart from the plain meaning of "firefighter" as one "authorized to engage in fire-fighting activities." Furthermore, even if the meaning of the word "firefighter" were found to be ambiguous, defendant argues that the BJA's interpretation of the word is reasonable and, therefore, entitled to deference. Finally, defendant reiterated that Christopher was prohibited from performing fire suppression activities by Pennsylvania State law and, thus, he did not die in the "line of duty," as defined by the BJA's implementing regulations.

This court has jurisdiction to review final decisions of the BJA pursuant to *28 U.S.C. § 1491 (2000)*. See *United States v. Mitchell, 463 U.S. 206, 216, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983)*; *Yanco v. United States, 258 F.3d 1356, 1358-59*

(Fed. Cir. 2001), cert. denied, *534 U.S. 1114, 122 S. Ct. 921, 151 L. Ed. 2d 885 (2002)*. Plaintiff has standing to bring an action on behalf of the deceased as the sole legal parent at the time of his death pursuant to *42 U.S.C. § 3796(a)(5) (2000 & Supp. II 2002)*. The parties have filed cross-motions seeking judgment on the administrative record pursuant to *Rule 56.1* of the Rules of the United States Court of Federal Claims (RCFC).

DISCUSSION

Judicial review of BJA decisions is limited to the following inquiries:

> (1) whether there has been substantial compliance with statutory requirements and with the requirements of implementing regulations;
>
> (2) whether there has been any arbitrary or capricious action on the part of the government officials involved; and
>
> (3) whether the decision denying the claim is supported by substantial evidence.

Yanco v. United States, 258 F.3d at 1362 (citing *Chacon v. United States, 48 F.3d 508, 511 (Fed. Cir. 1995)*); see also *Greeley v. United States, 50 F.3d 1009, 1010 (Fed. Cir. 1995)* (quoting *Morrow v. United States, 227 Ct. Cl. 290, 296, 647 F.2d 1099, 1102*, cert. denied, *454 U.S. 940, 102 S. Ct. 475, 70 L. Ed. 2d 247 (1981)*).

The Public Safety Officers' Death Benefits Act states:

> In any case in which the Bureau of Justice Assistance (hereinafter in this subchapter referred to as the "Bureau") determines, under regulations issued pursuant to this subchapter, that a public safety officer has died as

> the direct and proximate result of a personal injury sustained in the line of duty, the Bureau shall pay a benefit of $ 250,000, adjusted in accordance with subsection (h) of this section . . . .[4]

42 U.S.C. § 3796(a) (2000 & Supp. II 2002) (emphasis added).

The PSOBA defines "public safety officer" as "an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, as a firefighter, as a chaplain, or as a member of a rescue squad or ambulance crew[.]" *42 U.S.C. § 3796b(8)(A)* (redesignated in 2006 as *§ 3796b(9)(A)*) (emphasis added).

Whether a fourteen-year old "apprentice firefighter" is a "firefighter" for purposes of the PSOBA appears not to have been addressed in this circuit. Neither party has brought relevant case authority to the court's attention, nor has the court identified directly applicable case law.

The first step in statutory construction is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002)* (quoting *Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997)*). The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" Id. (quoting *Robinson v. Shell Oil Co., 519 U.S. at 340*). In interpreting the plain meaning of the statute, it is the court's duty, if possible, to give meaning to every clause and word of the statute. See *TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001)* ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be

prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting *Duncan v. Walker, 533 U.S. 167, 173, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001)*); *Williams v. Taylor, 529 U.S. 362, 404, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)* (describing as a "cardinal principle of statutory construction" the rule that every clause and word of a statute must be given effect if possible). Similarly, the court must avoid an interpretation of a clause or word which renders other provisions of the statute inconsistent, meaningless, or superfluous. See *Duncan v. Walker, 533 U.S. 167, 121 S. Ct. 2120, 150 L. Ed. 2d 251*, (noting that courts should not treat statutory terms as "surplusage"). "When two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Radzanower v. Touche Ross & Co., 426 U.S. 148, 155, 96 S. Ct. 1989, 48 L. Ed. 2d 540 (1976)*; see also *Hanlin v. United States, 214 F.3d 1319, 1321 (Fed.Cir.)*, reh'g denied (2000).

When the statute provides a clear answer, the court's analysis is at an end. See *Barnhart v. Sigmon Coal Co., 534 U.S. at 450*. Thus, when the "statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *Johnson v. United States, 529 U.S. 694, 723, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000)* (quoting *United States v. Ron Pair Enters., 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)* (quoting *Caminetti v. United States, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917)*)). In such instances, the court should not consider "conflicting agency pronouncements" or "extrinsic evidence of a contrary intent." *Weddel v. Sec'y of Dep't of Health and Human Servs., 23 F.3d 388, 391 (Fed.Cir.)* (citing *Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476, 112 S. Ct. 2589, 120 L. Ed. 2d 379 (1992)* (noting that courts must not defer to agency interpretation contrary to the intent of Congress evidenced by unambiguous language) and *Darby v. Cisneros, 509 U.S. 137, 147, 113 S. Ct. 2539, 125 L. Ed. 2d 113 (1993)*), reh'g denied, en banc suggestion declined (1994). "Only language

that meets the constitutional requirements of bicameralism and presentment has true legal authority." *Weddel v. Sec'y of Dep't of Health and Human Servs., 23 F.3d at 391* (citing *INS v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983)*). "'Courts have no authority to enforce [a] principle gleaned solely from legislative history that has no statutory reference point.'" *Shannon v. United States, 512 U.S. 573, 583-84, 114 S. Ct. 2419, 129 L. Ed. 2d 459 (1994)* (quoting *Int'l Bhd. of Elec. Workers, Local Union No. 474 v. NLRB, 814 F.2d 697, 712, 259 U.S. App. D.C. 168 (D.C. Cir. 1987)*). Consequently, if a statute is plain and unequivocal on its face, there is usually no need to resort to the legislative history underlying the statute. See *Whitfield v. United States, 543 U.S. 209, 125 S. Ct. 687, 160 L. Ed. 2d 611 (2005)* ("Because the meaning of [the statute's] text is plain and unambiguous, we need not accept petitioners' invitation to consider the legislative history . . . ."); *Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1196 (Fed. Cir. 2004)* ("Though 'we do not resort to legislative history to cloud a statutory text that is clear,' *Ratzlaf v. United States, 510 U.S. 135, 147-48, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994)*, we nevertheless recognize that 'words are inexact tools at best, and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history.'") (quoting *Tidewater Oil Co. v. United States, 409 U.S. 151, 157, 93 S. Ct. 408, 34 L. Ed. 2d 375 (1972)*), reh'g and reh'g en banc denied (2004).

"If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694* (footnote omitted), reh'g denied, *468 U.S. 1227, 105 S. Ct. 28, 105 S. Ct. 29, 82 L. Ed. 2d 921 (1984)*. The Supreme Court also has written

that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp., 533 U.S. 218, 226-27, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001)* (quoted in *Yanco v. United States, 258 F.3d at 1362*). The United States Court of Appeals for the Federal Circuit has found that "Congress has expressly delegated to BJA the task of promulgating regulations to implement the [Public Safety Officers' Death] Benefits Act." *Yanco v. United States, 238 F.3d at 1362* (citing *42 U.S.C. § 3796c(a)*). The regulations at issue in the case currently before the court are set forth in *28 C.F.R. §§ 32.2(c), (j)* and *(n)* and were promulgated in exercise of that authority. See *28 C.F.R. § 32.1 (1997)*. "BJA's implementing regulations thus qualify for *Chevron* deference." *Yanco v. United States, 258 F.3d at 1362.*

Chevron deference requires that a court ask two questions when reviewing an agency's construction of a statute: First, the court must ask "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. at 842-43*. If congressional intent is clear, then the court looks no further, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id. at 842-43* (footnote omitted). However, if Congress is silent, or if it has left the statute "ambiguous with respect to the specific issue," the court must ask the second question: "whether the agency's answer is based on a permissible construction of the statute." *Id. at 843* (footnotes omitted).

With respect to an agency's statutory construction: "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question had arisen in a judicial proceeding."

Id. at 843 n.11 (citations omitted). However, "deference does not mean acquiescence." *Presley v. Etowah County Comm'n, 502 U.S. 491, 508, 112 S. Ct. 820, 117 L. Ed. 2d 51 (1991).* "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. at 843 n.9* (citations omitted). Thus, this court should defer to an agency's construction of the statute if it "reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' express intent." *Rust v. Sullivan, 500 U.S. 173, 184, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. at 842-43*). The converse is likewise true that the court should only defer to the agency's interpretation if it is not in conflict with the congressional intent.

Plaintiff asserts that because Christopher was an officially recognized member of the Brookhaven, Pennsylvania, Volunteer Fire Department, he should be considered a public safety officer and "firefighter" pursuant to the statute for all purposes, including death benefits. Defendant responds that being a member of a "legally organized fire department" is a necessary, but not a sufficient condition to being a "firefighter." According to the defendant, to be eligible for death benefits, Christopher also must fit the statutory definition of "firefighter" according to the plain meaning of the word, and the definition of "line of duty" in the implementing regulations.

The PSOBA definition of the term "firefighter" states: "firefighter" "includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department...." [5] *42 U.S.C. § 3796b(4)*

(emphasis added). It is a broad and encompassing definition included in a death benefits statute intended to compensate grieving family members, in small part, for their loss. The BJA regulations written to implement the PSOBA similarly state that: "Firefighter includes any individual serving as an officially-recognized or designated member of a legally-organized volunteer fire department." *28 C.F.R. § 32.2(n) (2002)* (emphasis added). The only difference between the statute and the implementing regulation in the definition of "firefighter" is a one-word change from "an individual serving as an officially recognized or designated member of a legally organized volunteer fire department" in the statute to "any individual serving as an officially recognized or designated member of a legally organized volunteer fire department" in the regulations. Neither the statute nor the regulations apply age or duty requirements, or add other limitations to the definition of the term firefighter.

The key words chosen by the legislators in the PSOBA definition of "firefighter" are "includes an individual." The drafters of the statute did not choose to employ such terms as "means" or "is defined as." The PSOBA also defines the term "chaplain" to "include[] any individual serving as an officially recognized or designated member of a legally organized volunteer fire department . . . ." *42 U.S.C. § 3796b(2)*. In contrast, other definitions in *42 U.S.C. § 3796b* consciously do use the word "means" to define the terms "child," "law enforcement officer," "member of a rescue squad or ambulance crew," and "public safety officer." *42 U.S.C. §§ 3796b(2)-(9)*. Therefore, when Congress chose to use the word "includes" rather than a term such as "means" or "is defined as" in reference to "firefighter" and "chaplain," Congress signaled a broader, more expansive interpretation as appropriate to understand the terms "firefighter" and "chaplain." The terms "firefighter" and "chaplain" are appropriately considered umbrella terms for those officially recognized or designated as individuals serving in an

organized fire department. See *42 U.S.C. § 3796b(2),(4)*. The absence of a more specific definition in *section 3796b* of the term "firefighter" indicates that Christopher's age and more limited duties within the Brookhaven, Pennsylvania, Volunteer Fire Department do not eliminate his categorization as a "firefighter" under the statute. Furthermore, the age restrictions on duties allowed to be performed are imported into the case, as discussed more fully below, from the Pennsylvania Child Labor Law, not the federal statute. Moreover, the Pennsylvania statute sets no limitations on categorization of an individual as a firefighter, but only addresses limits on tasks which a minor "firefighter," is permitted to perform in Pennsylvania. In fact, the Pennsylvania statute, which sets those limitations, specifically begins the statutory section with the words "Minors who are members of a volunteer fire company." *43 PA. CONS. STAT. ANN. § 48.3* (West 2006).

Since Congress chose not to define "firefighter" more specifically, the court addresses the ordinary, plain meaning of the word. *Williams v. Taylor, 529 U.S. 420, 431, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000)* ("We give the words of a statute their 'ordinary, contemporary, common meaning,' absent an indication Congress intended them to bear some different import." (quoting *Walters v. Metro. Ed. Enters., Inc., 519 U.S. 202, 207, 117 S. Ct. 660, 136 L. Ed. 2d 644 (1997)* (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 388, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)*)). Defendant argues that the word "firefighter" means a "person who fights fires," CITING MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 2002). Although there are undoubtedly many somewhat different dictionary definitions of the word "firefighter," even the defendant's own dictionary choice would not exclude Christopher as one who "fights fires."

The language of the PSOBA clearly does not limit death benefits eligibility according to duties performed at the scene

of a fire; nor do the legislative history of the Act or the words of the regulations. None of these indicate that engaging in front-line activities is a component of "firefighting" or "suppression of fires." In 1975, when the statute was first drafted to include firefighters, the PSOBA was originally introduced as House Resolution 365, which defined "eligible firefighter" as one who was "actually and directly engaged in fighting a fire[.]" H.R. 365, 94th Cong. (1975). The Senate version of the bill, however, did not include this requirement, but described a "fireman" as "including a person serving as an officially recognized or designated member of a legally organized volunteer fire department[.]" S. 2572, 94th Cong. (1975). Any language requiring a firefighter to be authorized to engage directly in the fighting of fires was omitted from the final version of the Act. [6] In fact, the Joint Explanatory Statement of the Conference Committee specifically chose to follow the Senate's description of "fireman" and authorized payment "for all line of duty deaths" and not just those sustained "while actually and directly engaged in fighting fires or in other activities determined by the Law Enforcement Assistance Administration to be potentially dangerous." H.R. REP. NO. 94-1501, at 5-6 (1976). The words of the statute and the regulations are easily understood without adding duty-specific limitations, which, contrary to any congressionally expressed intent, would eliminate some eligible "firefighters" from death benefits. Defendant, therefore, fails to demonstrate that in the legislation passed, Congress intended to limit coverage to firefighters who directly place themselves in danger when fighting fires. In fact, in the defendant's response brief, the defendant even concedes at one point that the proper test for coverage is the person's authority to act as a firefighter, law enforcement officer, or chaplain, not whether the person is involved in an inherently dangerous activity. [7]

Additionally, and of interest, in 2002, Congress amended the PSOBA to include chaplains as public safety officers. [8]

Pub. L. No. 107-196, 116 Stat. 719 (2002). The term "chaplain" under the PSOBA "includes [9] any individual serving as an officially recognized or designated member of a legally organized volunteer fire department or legally organized police department, or an officially recognized or designated public employee of a legally organized fire or police department who was responding to a fire, rescue, or police emergency." *42 U.S.C. § 3796b(2).* Moreover, the plain meaning of the word "chaplain" does not require such an individual to fight fires or enforce laws. [10] By including chaplains as public safety officers along with firefighters and law enforcement officers, Congress expanded the eligibility for PSOBA benefits to include a larger group of individuals, such as chaplains, who clearly are not directly engaged in the suppression of fires and crime prevention activities. Since chaplains need not be authorized to engage in firefighting or crime preventing activities, or place themselves in danger while at a fire or crime scene, or even participate in firefighter or anti-crime activities, allowing recovery only to individuals authorized to engage in specifically hazardous activity (thereby excluding Christopher) impermissibly restricts the scope of the statute. Moreover, inasmuch as the BJA's regulation, *28 C.F.R. § 32.2(c) (2002)*, requires public safety officers to have their "primary function" as fire suppression or enforcement of the criminal law, the regulation is internally inconsistent, and therefore disregarded, since the primary function of a chaplain is neither suppression of fires or law enforcement and yet chaplains are still entitled by statute to recover.

Although there are many tasks involved in firefighting, defendant's counsel tries to narrow the definition of the term "firefighter." Consistent with the conclusions of the BJA, defendant's counsel again asserts that in order to be a "firefighter," one must have the authority to engage in the "suppression of fires," which the defendant argues excluded Christopher due to the restrictions on his activities based on

Pennsylvania law. In order for Christopher to be an apprentice firefighter, his activities had to conform with the Brookhaven Fire Company's Rules and Regulations for Apprentice Firefighters. Those rules and regulation state that "apprentice firefighters must abide by all rules and regulations, standard operating procedures of the Brookhaven Fire Company and the Child Labor Laws of the State of Pennsylvania." The Pennsylvania's Child Labor Law, with respect to minors and volunteer fire companies, states:

> (a Minors who are members of a volunteer fire company and volunteer forest fire crew may participate in training and fire-fighting activities as follows:
>
> (1 Drivers of trucks, ambulances or other official fire vehicles must be eighteen years of age.
>
> (2 Minors sixteen and seventeen years of age who have successfully completed a course of training equal to the standards for basic fire-fighting established by the Department of Education and the Department of Environmental Resources, may engage in fire-fighting activities provided that such minors are under the direct supervision and control of the fire chief, an experienced line officer or a designated forest fire warden.
>
> (3) No person under eighteen years of age shall be permitted to (i) operate an aerial ladder, aerial platform or hydraulic jack, (ii) use rubber electrical gloves, insulated wire gloves, insulated wire cutters, life nets or acetylene cutting units, (iii) operate the pumps of any fire vehicle while at the scene of a fire, or (iv) enter a burning structure.

(b) The activities of minors under sixteen years of age shall be limited to:

(1) Training.

(2) First aid.

(3) Clean-up service at the scene of a fire, outside the structure, after the fire has been declared by the fire official in charge to be under control.

(4) Coffee wagon and food services.

(c) In no case, however, shall minors under sixteen years of age be permitted to:

(1) Operate high pressure hose lines, except during training activities;

(2) Ascend ladders, except during training activities; or

(3) Enter a burning structure.

(d) All other activities by minors who are members of a volunteer fire company or a volunteer forest fire crewman shall be permissible unless specifically prohibited by this act.

43 PA. CONS. STAT. ANN. § 48.3 (West 2006) (footnote omitted; emphasis added).

Initially, as the court noted above, section (a) of the Pennsylvania statute begins with the phrase, "minors who are members of a volunteer fire company," thereby acknowledging as a given that minors can be "members of a volunteer fire company." Defendant argues, however, that "as a fourteen-year old, under Pennsylvania law, he [Christopher] could not engage in any firefighting activities; his activities

were limited to training, first aid, clean-up, and food services. These activities cannot be considered firefighting activities, as firefighting is understood in its ordinary and common usage." (emphasis in original). Interestingly, the description of Christopher's firefighting duties offered by the BJA in its initial denial of the claimant's original claim is more expansive than the definition the defendant's counsel now offers to this court. The BJA's initial denial stated:

> The activities permitted by the position description for apprentice volunteer firefighters submitted by the fire company allowed minors 14 and 15 years old (including Apprentice VFF Kangas) to participate in training activities, provide first aid care to victims at emergency scenes, and assist with clean-up activities such as rolling hose, putting away portable tools, and removing debris under supervision of the officer in charge and outside of fire buildings and collapse zones. He was allowed to provide canteen (food service) activities and participate in a support capacity for searches, rescues, wild fires, hazardous materials incidents, and water supply operations.

Similarly, the definition of Christopher's firefighting duties included in the BJA Hearing Officer's report also is broader than the defendant's counsel's current description to this court.

> 4. Junior firefighter Kangas was permitted . . . to ride to fires on the fire truck. He was also allowed to perform various activities at the scene of the fire, including off-loading equipment, attaching non-pressurized hoses to a water source, administering first aid to victims, assisting with the canteen for the line

> firefighters, cleaning up (rolling hoses) and removing of debris under supervision of the fire commander. He could provide support at hazardous materials scenes but he could not participate in dealing with the hazardous materials. He could also participate in search and rescue operations.

Defendant also cites to three other definitions of firefighter in unrelated federal statutes and regulations in support of its position. First, defendant cites to the Fair Labor Standards Act (FLSA) of 1938 which defines "Employee in fire protection activities" as "an employee, including a firefighter . . . who- is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department . . .; and (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk." *29 U.S.C. § 203(y) (2000).* As discussed above, Christopher had the legal authority to be part of a team that engaged in fire suppression. Moreover, this FLSA definition is inapposite as it deals only with employees of public agencies and specifically "does not include any individual who volunteers to perform services for a public agency . . . ." *29 U.S.C. § 203(e)(4)(A).* Next, defendant cites to the Federal Employees Retirement System which defines firefighter as "an employee occupying a rigorous position, whose primary duties are to perform work directly connected with the control and extinguishment of fires . . . ." *5 C.F.R. § 842.802 (2005).* Again, this definition deals with employees, not volunteers, and similarly defines firefighters for purposes of pay and retirement benefits eligibility. Moreover, regardless of definitions chosen by Congress in the FLSA or in a federal retirement statute, the PSOBA definition of the term "firefighter" is not limited by duties to be performed.

Finally, defendant cites to the Federal Emergency Management Agency (FEMA), Department of Homeland Security Fire Prevention and Control Assistance to Firefighters Grant Program, which defines "active firefighter" as "a member of a fire department or organization in good standing that is qualified to respond to and extinguish fires or perform other fire department emergency services and has actively participated in such activities during the past year." *44 C.F.R. § 152.2 (2005)*. The agency opinions issued by the BJA agree that Christopher was a member of a fire department in good standing and was qualified to perform certain fire department response and other emergency services. This third alternative definition applicable to FEMA, contrary to defendant's position, appears to include Christopher as a firefighter based on his status as a "member of a fire department in good standing that is qualified to . . . perform other fire department emergency services."

Aside from defendant's bald assertion that Christopher's responsibilities "cannot be considered firefighting activities, as firefighting is understood in its ordinary and common usage," defendant fails to demonstrate how Christopher's authorized duties do not constitute important functions of "fire suppression" by the Brookhaven, Pennsylvania, Volunteer Fire Department team. Nothing in the dictionary definition or statutory language requires a "firefighter" to be authorized to enter burning buildings, or describes how deeply and how soon an individual must penetrate a fire scene to qualify as a firefighter.

As a member of the Brookhaven, Pennsylvania, Volunteer Fire Department, Christopher was authorized to attend the scene of a fire. Although he was not authorized to hold a high pressure hose or run into a burning building, consistent with the Pennsylvania statute, he was authorized to perform a variety of critical firefighting functions at the scene of uncontrolled fires. As testified to by the Brookhaven Fire Chief, without the assistance of volunteer firefighters like

Christopher, those firefighters entering uncontrolled, burning buildings would not have had the same resources available at the scene of a fire. Christopher was part of a team dedicated to the suppression of fires and control of fire scenes. That team depended on the contributions from each member of the team, including junior firefighters, so that the other members of the team also could carry out their responsibilities. As the BJA's predecessor, the Law Enforcement Assistance Administration, pointed out in 1977 when the implementing regulations of the PSOBA were in their promulgation phase: "Even those officers performing desk assignments are primarily involved, even though indirectly, in . . . firefighting." 42 Fed. Reg. No. 88 at 23252 (May 6, 1977). [11] The same principle operates in any corporation or government agency, including the military.

In conclusion, Christopher was a recognized apprentice "firefighter" of the Brookhaven Volunteer Fire Department. He was authorized to attend the scene of a fire, off-load equipment, attach non-pressurized hoses to water sources, administer first-aid to victims, assist in food services, roll hoses after a fire, remove debris, provide support at hazardous material scenes, and participate in search and rescue operations. Christopher engaged in activities involved in the "suppression of fires." He was a "firefighter" in the ordinary sense of the word. Therefore, this court concludes that the BJA decisions, which did not recognize Christopher as a "firefighter," were unreasonable, arbitrary and capricious. The BJA's interpretation was unreasonably and impermissibly restrictive in light of the language of the PSOBA.

Defendant also argues that because Christopher was not authorized to engage in fire suppression, he did not die in the "line of duty." The PSOBA states that to be eligible for death benefits under the statute, a public safety officer must have died "as the direct and proximate result of a personal injury sustained in the line of duty[.]" *42 U.S.C. § 3796(a).* The

PSOBA does not contain a definition for the term "line of duty" nor does it contain the words "suppression of fires." The House and Senate Conference Committee prior to the enactment of the PSOBA concluded that "the 'line of duty' is a well established concept and that it is appropriate to extend coverage to all acts performed by the public safety officer in the discharge of those duties which are required of him in his capacity as a law enforcement officer or as a fireman." H.R. REP. NO. 94-1501, at 6 (1976) (emphasis added).

The implementing regulations to the PSOBA define "line of duty" as follows:

> (c) *Line of duty* means:
>
> > (1) Any action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or suppression of fires is obligated or authorized by rule, regulations, condition of employment or service, or law to perform, including those social, ceremonial, or athletic functions to which the officer is assigned, or for which the officer is compensated, by the public agency he serves. For other officers, "line of duty" means any action the officer is so obligated or authorized to perform in the course of controlling or reducing crime, enforcing the criminal law, or suppressing fires[.]

28 C.F.R. § 32.2(c)(1) (2002) (emphasis added).

As described above, as a junior firefighter, Christopher's primary function was to be part of the team that engaged in "the suppression of fires." He was authorized to ride in fire engines to the scene of a fire. At the scene of a fire, Christopher was tasked with laying out and attaching fire hoses to water sources, maintaining equipment when not in

use, and providing a variety of other services at the scene of a fire. His "primary function," like those directing the hoses on the fires or rushing into burning buildings, was "the suppression" of fires. The court concludes that the decisions by the BJA which impermissibly limited the definition of "line of duty" under the statute and, therefore, denied death benefits to the plaintiff, were arbitrary and capricious and founded on an unreasonably restrictive reading of the words of the PSOBA and the implementing regulations. In sum, Christopher met the PSOBA and regulatory tests for death benefits eligibility as a "firefighter" who died in the "line of duty."

Finally, the fact that Christopher was en route to a fire and not at the scene does not preclude plaintiff from recovery. The court in *Davis v. United States, 46 Fed. Cl. 421 (2000)* adopted an "on duty" standard for recovery, *id. at 426*, and held that a police officer did not have to be "acting to intervene in a law enforcement capacity" to be "in the line of duty" under the PSOBA, *id. at 427*. In Davis v. United States, the officer had left work early before his shift ended and was struck by another car which was fleeing another police officer. *Id. at 422*. In the instant case, Christopher was responding to and on his way to a fire alert when he was struck by a car. Christopher was "in the line of duty" while responding to a fire.

CONCLUSION

For the foregoing reasons, the court finds that pursuant to *section 3796(a)* of the Public Safety Officers' Death Benefits Act and the implementing regulations, Christopher Kangas died "in the line of duty" and was a "firefighter" authorized to be at a fire scene and perform duties as part of a team engaged in "the suppression of fires" at the time of his death. Therefore, the BJA's decision to deny benefits to Christopher Kangas was an arbitrary exercise of its authority. Plaintiff's motion for judgment on the administrative record is

GRANTED, and defendant's cross-motion is **DENIED**. The Clerk of the Court is directed to enter **JUDGMENT** in the amount of $ 250,000.00, adjusted in accordance with *42 U.S.C. § 3796(h)*, in favor of the plaintiff.

IT IS SO ORDERED.

MARIAN BLANK HORN

Judge

Footnotes

fn1The PSOBA was amended in 2006 and the definition for "public safety officer" is now found at *42 U.S.C.A. § 3796b(9)* (West, Westlaw through 2006 amendments).

fn2The omitted language here read "in violation of Pennsylvania statute (*43 P.S. § 48.3*)." However, the Pennsylvania Bureau of Labor Law Compliance provided a clarification of the Pennsylvania Child Labor Law (CLL) in a letter which states: "It is our opinion that the CLL law does not prohibit 14- and 15- year -olds from riding fire apparatus to the scene of a fire or other emergency." Letter from Pennsylvania's Bureau of Labor Law Compliance to Edward Mann, Pennsylvania State Fire Commissioner (April 21, 2003) (on file with the court). The BJA subsequently amended its findings in its final determination to be consistent with the Pennsylvania state opinion.

fn3The PSOBA defines firefighter as "including an individual serving as an officially recognized or designated member of a legally organized fire department...." *42 U.S.C. § 3796b(3) (2000 & Supp. II 2002*

fn4*Section 3796(h)* provides that: "On October 1 of each fiscal year beginning after June 1, 1988, the Bureau shall adjust the level of the benefit payable immediately before

such October 1 under subsection (a) of this section, to reflect the annual percentage change in the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics, occurring in the 1-year period ending on June 1 immediately preceding such October 1." *42 U.S.C. § 3796(h) (2000 & Supp. II 2002).*

fn5The definition of firefighter in 2002 also included "an officially recognized or designated public employee member of a rescue squad or ambulance crew." *42 U.S.C. § 3796b(4) (2000 & Supp. II 2002).* Congress removed this language by amendment in 2006 and added *section 3796b(7),* which defined "member of a rescue squad or ambulance crew" separately from a firefighter. Pub. L. No. 109-162, 119 Stat. 2960 (2006).

fn6As noted above, the final version of the Public Safety Officers' Death Benefits Act of 1976 states: "'fireman' includes a person serving as an officially recognized or designated member of a legally organized volunteer fire department[.]" H.R. 366, 94th Cong. (1976) (enacted).

fn7The defendant's counsel wrote: "Again, Mrs. Amber-Messick errs by failing to recognize that the proper test for coverage under the Act is the person's authority to act as a firefighter, or law enforcement officer, or chaplain, etc., not whether the person is engaging in an inherently dangerous activity." (emphasis in original).

fn8Congress also included members of rescue squads and ambulance crews as public safety officers in 1986. Pub. L. 99-591, 100 Stat. 3341 (1986).

fn9As discussed above, when Congress has used the term "includes" to describe a public safety officer, it did not specifically define the term.

fn10The Merriam-Webster Online Dictionary defines chaplain as "1: a clergyman in charge of a chapel [;] 2: a clergyman officially attached to a branch of the military, to an institution, or to a family or court[;] 3: a person chosen to conduct religious exercises (as at a meeting of a club or society)[;] 4: or a clergyman appointed to assist a bishop (as at a liturgical function)." MERRIAM-WEBSTER ONLINE DICTIONARY, available at http://www.m-w.com/dictionary/chaplain (as of March 24, 2006).

fn11The preamble to the rule, however, does contain somewhat inconsistent language: "Because LEAA believes the broad concept of making coverage dependant on the officer's authority should be applied to firefighters as well, the proposed definition of "firefighter" has been amended to include 'all fire service personnel *authorized to engage in the suppression of fires*, including any individual serving as an officially-recognized or designated member of a legally-organized volunteer fire department' (amendment emphasized)." Id. (citing *28 C.F.R. § 32.2(j) (1977)*). As noted above, however, the concept of "suppression of fires" was removed from the regulatory definition of "firefighter" prior to the time of Christopher's death and has not been reincorporated in the regulations except in the definition of "line of duty."

2006-5087

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JULIE AMBER-MESSICK, Administratrix of the Estate of Christopher Kangas, deceased,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

May 11, 2007, Decided

May 11, 2007, Filed

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

COUNSEL: For Julie Amber Messick, Administratrix of the Estate of Christopher Kangas, Plaintiff-Appellee: DALY, FRANK W., PRINCIPAL ATTORNEY, Daly, Gorbey, Media, PA.

For United States, Defendant-Appellant: KIM, NANCY, PRINCIPAL ATTORNEY, Department of Justice, Washington, DC; MADAN, RAFAEL A., HUGHES, TODD

M., COHEN, DAVID M., BRADY, GREGORY C., OF COUNSEL ATTORNEY, Department of Justice, Washington, DC.

JUDGES: Before Newman, Circuit Judge, Schall, Circuit Judge, and Bryson, Circuit Judge.

OPINION

ORDER

A petition for rehearing having been filed by the Appellee,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on June 8, 2007.

4/28/05
Mr. Frank W. Daly
Dly, Gorbey & O'Brien, P.C,
110 West Front Street
Post Office Box 199
Media, Pennsylvania 19063-0199

Regarding: Apprentice Volunteer Firefighter Christopher Kangas; PSOB Claim No. 2002-117

Dear Mr. Daly:

This is to notify you that following a careful review of the case file and the appeal record, the Director of the Office of Justice Programs' Bureau of Justice Assistance (BJA), has upheld the determinations made by the Public Safety Officers' Benefits (PSOB) Office and Hearing Officer Douglas C. Dodge, that this claim is ineligible for benefits pursuant to the PSOB Act (42 U.S.C. 3796). A copy of the Director's determination is enclosed.

Consistent with Section. 32.24(1)(2) of PSOB's implementing regulations (28 CFR 32), the Director's decision represents the Agency's final determination.

For additional questions you might have, please call the PSOB Office at 202/307-0635 or toll free at 1/888-744-6513).

Sincerely,
Hope D. Janke
Director
Public Safety Officers' Benefits Office

Date: April 28, 2005

From: Domingo S. Herraiz Director

Bureau of Justice Assistance

Subject: Christopher Kangas
PSOB Claim # 02-117
Appeal to the Director

Final Agency Decision

In response to the appeal of Julie Amber-Messick (the "Claimant"), in connection with the above-referenced claim, to me as Director of the Bureau of Justice Assistance ("BJA"), as authorized under 28 C.F.R. § 32.24(i), I have reviewed the record, including the decisions of the Hearing Officer and the Public Safety Officers' Benefits ("PSOB") Office, and the Claimant's comments on the record dated June 29, 2004, and August 9, 2004. Based on this review, it is my determination that the claim must be denied.

The death of young Christopher Kangas, the Claimant's son, undeniably is a tragedy. The deep sympathy that I feel for the loss of this fine young teenager, however, does not allow me to deviate from my duty as administrator of the PSOB program and award his family the sizable PSOB death benefit (almost $260,000), when young Christopher's death is not covered under the program's authorizing statute. Simply stated, although young Christopher may have been a member of the firefighting community in some sense, he was not a "firefighter" within the meaning of the PSOB Act, because he had no legal authority to fight fires.

Background

On May 4, 2002, Christopher, a 14-year old "junior (apprentice) volunteer firefighter" with the Brookhaven, Pennsylvania, Volunteer Fire Department, was stick by an automobile when he ran a stop sign while riding his bicycle, helmetless, to the fire station in response to an alarm, Christopher died on May 5, 2002, of injuries sustained in this

accident.

In June, 2002, the Claimant filed the instant claim pursuant to the PSOB Act, 42 U.S.C. § 3796(a). On September 16, 2002, the PSOB Office denied the claim, based on the legal conclusion that Christopher was not a "public safety officer" within the meaning of the PSOB Act, 42 U.S.C. § 3796b(8).

The Claimant appealed the denial on March 4, 2003, and the appeal was assigned to a PSOB Hearing Officer on September 26, 2003. A hearing was held on the appeal on January 22, 2004, in Brookhaven, Pennsylvania. The Hearing Officer's Determination, dated April 26, 2004, denied the claim on the grounds that Christopher was not a "firefighter" within the meaning of the PSOB Act definition of "public safety officer," because he had no authority to engage in fire-fighting activities, a fundamental eligibility requirement under the PSOB Act.

Claimant requested a final agency review by the Director on June 29, 2004. Accompanying that request were Claimant's comments on the record and arguments on the relevant issues. Claimant submitted an additional argument on August 9, 2004. Claimant presented no new evidence in support of her request.

Findings of Fact

1. On May 4, 2002, 14-year-old Christopher Kangas was struck by an automobile when he ran a stop sign (entering a "T" intersection without stopping) while riding his bicycle, helmetless, to the fire station in response to an alarm. Christopher died on May 5, 2002, of injuries sustained in this accident.

2. On the date of has fatal injury, Christopher was a "junior (apprentice) volunteer firefighter" with the Brookhaven, Pennsylvania, Volunteer Fire Department

("VFD").

3. Christopher had been an active junior apprentice with the Brookhaven VFD since May 15, 2001, when he was voted in by the Brookhaven VFD Association. He had received at least 58.5 hours of training at the time of his death. He had been issued gear and went on numerous fire calls, within the limits prescribed by the apprenticeship program.

4. At all relevant times hereto, Pennsylvania law provided as fellows: (a) Minors who are members of a volunteer fire company.. . may participate in training and tire-fighting activities as follows:

(1) Drivers of trucks, ambulances or other official fire vehicles must be eighteen years of age.
(2) Minors sixteen and seventeen years of age, who have successfully completed a course of training equal to the standards of basic fire-fighting established by the Department of Education and the Department of Environmental Resources, may engage in fire-fighting activities provided that such minors are under the direct supervision and control of the fire chief, an experienced line officer or a designated forest fire warden.

(3) No person under eighteen years of age shall be permitted to (1) operate an aerial ladder, aerial platform or hydraulic jack, (ii) use rubber electrical gloves, insulated wire gloves, insulated wire cutters, life nets or acetylene cutting units, (iii) operate the pumps of any fire vehicle while at the scene of a fire, or (iv) enter a burning structure.

(b) The activities of minors under sixteen years of age, shall be limited to

(1) Training.

(2) First aid.
(3) Clean-up services at the scene of the fire, outside the structure, after the fire has been declared by the fire official in charge to be under control.
(4) Coffee wagon and food services.

(c) In no case, however, shall minors under sixteen years of age be permitted to:

(1) Operate high pressure hose lines, except during training activities;
(2) Ascend ladders, except during training activities; or
(3) Enter a burning structure.[1]

Thus, as a 14-year old minor, Christopher's Junior apprentice activities were strictly limited to those specified in subsection (b) (none of which involves fire suppression), and he was not legally authorized - in fact, was expressly forbidden by law - to engage in fire-suppression activities.[2]

The Public Safety Officers' Benefits Act

Pursuant to the PSOB Act,[3] "[i]n any case in which the Bureau of Justice Assistance...determines, under regulations issued pursuant to [the Act] that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Bureau shall pay" a death benefit in the amount established by law. 42 U.S.C § 3796(a). The Act defines "public safety officer" as "an individual serving a public agency in an official capacity, with or without compensation, . . , as a firefighter ..... Id. § 3796b(S)(A). In sharp contrast, the Act, properly speaking, does not define the term, "firefighter"; under the Act, rather, the term is given its plain, ordinary meaning,"[4] with the sole specification that it "includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department." Id. § 3796b(4).

To qualify under the PSOB, Act, a public safety officer's death must have been "the direct and proximate result of a personal injury sustained in the line of duty." Id. § 3796(a). The PSOB implementing regulations define "line of duty" a any "action which an officer whose primary function is ... suppression of fires is obligated or authorized by rule, regulation, condition of employment or service, or law to perform. . . by the public agency he serves. For other officers `line of duty' means any action the officer is so obligated or authorized to perform in the course of. . . suppressing fires."[5]

Conclusions of Law

1. Christopher Kangas was not a "firefighter" within the meaning of the PSOB Act and its implementing regulations. I agree with the Claimant that the term "firefighter," as used in the PSOB Act, is not ambiguous. As indicated above, the Act leaves the term with its ordinary meaning; i.e., as a plain reference to someone who is authorized to "fight fires." Nothing in the Act provides the slightest suggestion of departure from the common and usual understanding of the term[6] which understanding is confirmed in the implementing regulations, at 28 C.F.R. § 32.2(c) (quoted above), and in the uniform practice of the PSOB program since its inception in 1976. Because Pennsylvania law (discussed above) is unmistakbly clear that a 14-year old Junior apprentice has no legal authority to engage in fire-fighting or fire-suppression activity, I find that Christopher was not a "firefighter" within the meaning of the PSOB Act.[7]

2. Even if Christopher were a "firefighter" within the meaning of the PSOB Act (which he was not), his tragic death did not occur in the "line of duty," as defined in the PSOB regulations, because Pennsylvania law (discussed above) did not obligate or authorize him to engage in fire-fighting or fire-suppression activity.

3. Claimant suggests that I should defer to the views of

the Hon. Wayne Curbs Weldon, a distinguished Member of the U.S. House of Representatives, offered in his testimony at the hearing and in a press release he issued on June 18, 2004, after the Hearing Officer's decision, The Congressman provided his thoughts as to the legislative intent in connection with the Act, which was enacted nine years before he was elected to the House of Representatives, and, in particular, he opined that the legislative intention was that Christopher's death be covered by the P SOB program. Although I am appreciative of the Congressman's having taken time from his busy schedule to offer his assistance in this matter, I cannot accede to Claimant's suggestion. Even assuming statutory construction to be appropriate in this matter (which it is not), it is a fundamental axiom of statutory interpretation that post-enactment statements of legislators a to legislative intent- under any circumstances -- are of limited legal value 1n determining the meaning and legal effect of statutes[8] I see no warrant for statutory construction here, and, in any event, I am unpersuaded by the construction offered.

3. Finally, Claimant alleges that the Hearing Officer had "ex parte impermissible communication with the Department of Justice," which created "an appearance of impropriety" and "may have tainted [the Hearing Officers] objectivity." It appears that the "communication" referred to is expressly authorized by the PSOB implementing regulations, 28 CFR part 32, app. b.3., which provides that "[a]n attorney from the [OJP] Office of the General Counsel (OGC who has not participated in the consideration of the claim will provide legal advice to the hearing officer. The hearing officer is encouraged to solicit the advice of the assigned OGC attorney on all questions of law." The Hearing Officer explained to me in the attached letter, dated January 26, 2005, that his only communication regarding his decision in this case were with the OGC legal advisor duly assigned under this provision and he stated emphatically that these communications did not improperly influence his

determination that the claim should he denied. Consequently, I find that there was no improper ex parte communication.

Decision

Based on the foregoing findings of fact and conclusions of law,[9] it is my determination that Christopher Kangas was not a public safety officer or firefighter within the meaning of the PSOB Act and its implementing regulations and, therefore , that the claim is denied.

Footnotes

Fn1 43 Pa. Cons. Stat. § 48.3(a) to (c). The obvious prophylactic policy of this statute is to protect young apprentices (particularly those under sixteen years of age) from the risks and dangers inherent in fire-fighting and their own lack of maturity, experience, and judgment. It is, therefore, unsurprising; that none of the provisions authorizing any actual firefighting activity - as opposed to the activity described in subsection (b) - applies to fourteen-year-olds.

Fn2The Hearing Officer's determination cited to Pennsylvania Administrative Code Sec. 11.67(5)(i)7 which provides that "[m]inors 14 and 15 years of age may not do the following; (1) Ride an official vehicle to the scene of a fire. (ii) Participate in any fire fighting activities." Based on this statute, the Hearing Officer opined that the Brookhaven VFD had allowed Christopher to ride on fire apparatus in violation of Pennsylvania law. Since the date of the Hearing Officer's determination, however, Claimant, through her attorney, and the Brookhaven Fire Chief have provided me with a letter dated April 21, 2003, from the Bureau of Labor Law Compliance to the Pennsylvania State Fire Commissioner stating that ". . . the Department [of Labor and Industry has taken the position that 34 PA. Code § 11.67(5),

promulgated in 1970, has been superseded by section 7.3 of the CLL [PA Child Labor Law, codified as 43 Pa. Cons. Stat. § 48.3]." The letter concluded that 14- and 15-year olds are allowed to ride to fires on emergency apparatus. Accordingly, the record is amended to correct the Hearing Officer's findings on this point.

fn3 42 U.S.C. §§ 3796 to 3796c-1.

fn4 See, e.g., 2A Norman J. Singer, Sutherland Statutes and Statutory Construction §§ 47.67, .27 (6th ed. 2000) ("Sutherland') when the terms of a statute are not specifically defined, the words must be given their ordinary and popularly understood meanings, but the words must also he construed with reference to the purposes and objects of the statute); Glass v. Kemper Corp., 920 F.Supp. 928 (N.D. Ill. 1996), aff'd 133 F.3d 999 (7th Cir. 1998)

fn5 28 C.F.R. § 32 .2 (c)(1)(emphases added). Of course, this regulation., which was promulgated pursuant to at least four express statutory grants of regulatory authority, 42 U.S.C. Secs. 3796(a) (b), 3796c(a), and 1796d-3(a), "qualifies for Chevron deference," see, e.g., Yanco v. United States, 258 F.3d 1356, 1362 (2001), to the extent that the rule of Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 867 (1984), may he implicated by any relevant ambiguity in the statute.

Fn6 The use of "includes" in 42 U.S.C. § 3796b(4) merely ensures that volunteers who otherwise meet the definition of "firefighter" are not excluded from coverage under the PSOB Act; it cannot properly be used to gut the term, "firefighter," of its plain meaning - someone legally authorized to "fight fires." See, e.g., 2A Sutherland § 47.07; Federal Election Comm'n v. Massachusetts Citizens for Life, "769 F.2d 13,17 (1st Cir. 1985), aff'd, 479 U.S. 238 (1986) (discussing the term "includes" in a different statutory context).

Additionally, to the extent that 42 U.S.C. § 3796b(4) might arguably be understood to create some ambiguity (which it does not), such ambiguity would be resolved by 28 C.F.R. § 32.2(c)(1), which expressly defines the relevant "line of duty" activity for firefighters in terms of the obligation or authority to "suppress[] fires," and by reference to other statutes and regulations that deal with like subject matter, see 2A Sutherland § 47.16; 2B id. §§ 51.01 to .03 (2000), and also - commonsensically - relate the concept of firefighting to the authority to fight fires. Pursuant to 29 U.S.C. § 203(7)(y), for example, "`Employee in fire protection activities' means an employee, including a firefighter, . . . who- (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression ... ; and (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk." Similarly, 44 C.F.R. § 152.2 defines "Active firefighter [a]s a member of a fire department or organization in good standing that is qualified to respond to and extinguish fires or perform other fire department emergency services ."

Fn7 Claimant notes that the Commonwealth of Pennsylvania, Bureau of Worker's Compensation, paid a "Public Safety Worker Death Benefit" in the amount of $59,669 to the Claimant as a result of Christopher's death. This fact is not dispositive as to Claimant's eligibility to receive the PSOB benefit, because, as the court observed in Tafoya v. United States, 8 Cl. Ct. 256, 263 (1985) (citing North v. United States, 555 F.Supp. 382, 387 (Cl. Ct. 1982)), "[a]lthough differing Workmen's Compensation statutes in a multiplicity of states would under their quite different standards often reach a contrary result, they do not correspond to the specific standards mandated by the Public Safety Officers' Benefits Act of 1976." Indeed, the provision in the Pennsylvania Workers Compensation statute that provides coverage for "minor volunteer firefighters" appears to be unique, see

Hearing testimony, p. 75; and there is no special or corresponding provision in the PSOB Act affording coverage for apprentices who have no fire-fighting or fire-suppression authority.

Fn8 See, e.g., 2A Sutherland § 48.20; Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring); Pierce v. Underwood, 487 U.S. 552 (1988); United States v. Clark, 445 U.S. 23 (1984).

fn9 In view of my conclusions of law, above (particularly the first, second, and third), it is unnecessary for me to determine whether 42 U.S.C. § 3796a(1) or (3); see 28 C.F.R. §§ 32.6 and .7, which would preclude payment of the claim if applicable, may be implicated by the circumstances of Christopher's death, described above (particularly in my first finding of fact). See, e.g., Brookhaven Police Department Investigation Report (May 4, 2002); Commonwealth of Pennsylvania Police Accident Report (May 5, 2002); National Institute of Occupational Safety and Health Report No. F2002-21 (November 20, 2002) (exhibit 25 at the Claimant's hearing); see also Federal Emergency Management Administration pamphlet (exhibit 24 at Claimant's hearing).

Domingo S. Herraiz
Director
Bureau of Justice Assistance
U.S. Department of Justice Washington, D. C.

Re: Christopher Kangas
PSOB Claim # 02-11-7

Dear Director Herraiz:

I have been informed that the claimant in the above-referenced PSOB claim has alleged improper ex parte communications or involvement by Department of Justice/Bureau of Justice Assistance (DOJ/BJA) officials in my determination as hearing officer of the claimant's appeal under 28 CFR 32.24. By his letter, I wish to state unconditionally that my only communications in this matter with DOJ/BJA officials concerning my determination was with the attorney in the Office of the General Counsel (OGC) who was assigned to provide nee legal advice pursuant to the authority in section b.3 of the Appendix to the PSOB regulations at 28 CFR Part 32. My communication with this OCC legal advisor regarding the applicable law and formatting questions did not taint my objectivity and did not influence my determination that the claimant was not eligible for the PSOB death benefit.

Sincerely,

Douglas C. Dodge
PSOB Hearing Officer
Date: 1/26/05

APPEAL DETERMINATION FOR CHRISTOPHER KANGAS
PSOB CASE NO: 02-117.

INTRODUCTION
On May 4, 2002, Christopher Kangas was riding his bike to the Brookhaven Pennsylvania Volunteer Fire Department (VFD) in response to a fire alarm call. He was struck by a car and subsequently died on May 5, 2002, of the injuries from this accident. At the time of this death, Christopher was 15-years old and he was are apprentice (junior) volunteer firefighter with the Brookhaven VFD.

A Public Safety Officers' Benefits claim was filed with the Public Safety Officers' Benefits Office, Bureau of Justice Assistance (BJA), by Mrs. Julie Amber-Messick, junior firefighter Kangas' mother, sometime after the accident (there is no date on the form). An initial determination memorandum was competed by the PSOB Office and a letter denying benefits was sent to Mrs. Amber-Messick on September 16, 2002. She appealed the denial of benefits on March 4, 2003. The case was assigned to this hearing officer on September 26, 2003. I was notified that the claimant would be represented by a lawyer on November 6, 2003 and a hearing on his appeal was conducted in Brookhaven, Pennsylvania on January 22, 2004.

The PSOB Office denied benefits to Mrs. Amber-Messick, stating:

"[T]he evidence presented shows that Apprentice VFF Christopher Nicholas Kangas was not a public safety officer with the Brook haven fire Company No. 1 in an official capacity as a firefighter. The activities permitted by the position description for apprentice volunteer firefighters submitted by the fire company allowed minor 14 and 15 years old (including Apprentice VFF Kangas) to participate

in training activities, provide first aid care to victims at emergency scenes, and assist with clean-up activities such as rolling hose, putting away portable tools, and removing debris under the supervision of the office in charge and outside the fire buildings and collapse zones. He was allowed to provide canteen (food service) activities and participate in a support capacity for searches, rescues, wild fires, hazardous materials incidents, and water supply operations. However, Apprentice VFF Kangas was not permitted to operate equipment or assist with fire suppression at the fire scenes or enter hazardous atmospheres. Apprentice VFF was a trainee but did not possess authority to act as an official firefighter." (Initial Determination Memo)

At the request of the claimant, a hearing was held at the Brookhaven Fire Department on January 22, 2004. The claimant presented seven witnesses and provided several documents in support of the appeal of the denial of her claim for PSOB benefits

FOCAL ISSUE

Was junior firefighter Christopher Kangas a "firefighter" within the meaning of the PSOB Act and regulations at the time of his death?

FINDINGS OF FACT

1. On May 4, 2002, Christopher Kangas was responding to a fire call on his bicycle and he was struck by a car. He subsequently died from the injuries sustained is this accident.

2. On that date Kangas was a junior (apprentice) firefighter with the Brookhaven, Pennsylvania VFD.

3. Junior firefighter Kangas had been an active member of the volunteer fire company since May 15, 2001, when he was

voted in by the Brookhaven FVD Association. He had received at least 58.5 hours of training at the time of his death. He had been issued gear and went on numerous fire calls.

4. Junior firefighter Kangas was permitted, in violation of Pennsylvania statute (43 P.S. § 48.3), to ride to fires on the fire truck. He was also allowed to perform various activities at the scene of the fire, including off loading equipment, attaching non-pressurized hoses to a water source, administering first aid to victims, assisting with the canteen for thc line firefighters, cleaning up (rolling hoses) and removing of debris under supervision of the fire commander. He could provide support at hazardous materials scenes but he could not participate in dealing with the hazardous materials. He could also participate in search and rescue operations.

5. Junior Firefighter Kangas was not permitted by Pennsylvania statute (43 P.S. § 48.3) and fire company regulations to operate heavy. equipment, pressure hoses of any kind, ascend ladders, enter burning buildings or fire or hazardous materials zones; all of which are fundamental fm suppression activities.

FINDINGS OF LAW

When it established the Public Safety Officers' Death Benefits program, Congress expressly provided that the deceased person must be a "public safety officer" and die as the result of a "personal injury" while in the "line of duty" in order for his/her surviving relatives to receive the financial payment provided for. In the PSOB Act. 42 U.S.C. §3796, Pub.L.No. 90-351, as amended. ""Public safety officer" is defined in the statue as "an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, as a firefighter, as a chaplain, or

as a member of a rescue squad or ambulance crew, 42 U.S.C. § 3696 (b)(8). (emphasis added)

A firefighter is defined in the PSOB Act as "including an individual serving as an officially recognized designated member of a legally organized volunteer fire department and an officially recognized or designated public employee member of a rescue squad or ambulance crew." 42 U.S.C. § 369(b)(4). The regulations implementing the PSOB Act use the same language in defining a public safety officer and a firefighter. 28 CFR 32.2 (j) and (n) respectively. However, at one point the regulations elaborated on the definition of firefighter by including The phrase "engaged in the suppression of fires." For unknown reasons, this phrase was omitted from the regulations when the regulations were revised in 1985. There is no evidence in the record explaining why this language was omitted. There is no evidence whether the omission was by mistake or by design in order to make the regulation match exactly the definition in the Act. Importantly, at no time, as claimant asserts; did the PSOB Act use the phrase "engaged in the suppression of fires" to define firefighter.

Under Pennsylvania law, junior firefighters like Christopher Kangas are permitted to engage in certain activities at fire scenes and there are other activities in which their participation is prohibited. The Pennsylvania Administrative Code, 34 PA ADC § 11.67 (5) expressly prohibits 14 and 15 year olds from riding to fire scenes in official vehicles and participating in any ``fire fighting,, activity. The provision prohibiting junior firefighters from riding to fires in official vehicles was violated by the Brookhaven VFD, which, according to hearing testimony, routinely allowed 14 and 15 year old junior firefighters to ride to fires on fire trucks, if there was room.

Pennsylvania statue 43 P.S. §48.3 lists the activities that

junior firefighters (under age 16) are permitted to do: "The activities of minors under sixteen years of age shall be limited to: (1) training; (2) first aid; (3) clean-up service at the scene of a fire, outside the structure, after the fire has been declared by the fire official in charge to be under control; and (4) coffee wagon and food services.

DETERMINATION

This is indeed a tragic case in which a dedicated young man lost his life while serving his community. Junior firefighter Kangas clearly was an exemplary young man and junior firefighter. Despite my personal empathy and I am certain, the empathy and sadness of the Bureau of Justice Assistance as well, the reality is that his survivors are not entitled to' the PSOB death benefit of over $260,000 unless they can establish that he was a "firefighter" as defined in the PSOB Act and regulations. My legal conclusion is that he was not a "firefighter."
Claimant presented several arguments in support of her view that junior firefighter Christopher Kangas was a firefighter within the meaning of the PSOB Act and implementing regulations. These arguments are discussed below.

Claimant argues that junior firefighter Christopher Kangas was a firefighter within the meaning of the statute and regulations. (Transcript, p. 17 and claimant exhibit No. 3), Junior firefighter Kangas was an active member and had been in this capacity since he was voted in on May 15, 2001. (Transcript, p.18).

Claimant contends that the phrase "engaged in the suppression of fires" was removed from the statute. Claimant argues, therefore, that young Kangas did not have to be authorized to fight fires in order to be a firefighter. This is incorrect. This language was never a part of the definition of firefighter in the PSOB Act. This language was, however, in

the regulations implementing the PSOB Act until they were revised in 1955. As noted above, this language was omitted from the PSOB regulations for unknown reasons.

The claimant also argues that the requirement in the regulations that claims in which there is reasonable doubt as to the claimant's eligibility should be decided in favor of the claimant, (28 CFR 32.4) This regulation states: "The Bureau shall resolve any reasonable doubt arising from the circumstances of the officer's death or permanent and total disability in favor of the death or disability benefit." While I have not found case law defining "circumstances," it is clear that this regulation applies solely to factual issues related to the death or disability and not to the application of the law, Additionally, claimant raises the argument that the junior firefighter program is a major recruitment mechanism for volunteer fire departments. As such it meets the intent of Congress to provide the Public Safety Officers' Benefits as a means to recruit individuals to the fire services This argument was supported by the testimony of several witnesses: Chief Rob Montella of the Brookhaven VFD; and the State Fire Commissioner, Edward Mann; and Congressman Curtis Weldon.

Finally, the Claimant argues that the Bureau of Justice Assistance should give weight to the fact that Mrs. Amber-Messick was paid under the Pennsylvania Public Safety Worker Death Benefit Act of 1976. The State of Pennsylvania's Workers Compensation law specifically makes minor volunteer firefighters eligible for Workers Compensation.. (Transcript, p 75). While the Bureau of Justice Assistance may consider the fact that worker's compensation benefits were paid, this is ,not dispositive as to her eligibility to receive the PSOB benefit. The purposes and eligibility requirements of the PSOB Act are quite different from the workers compensation act which covers scope of work. See . Tafoya v. United States, 8 S.Ct. 256, 263 (1985),

citing North v. United States, I C1.Ct. 93, 98, 555 F.Supp. 382, 387 (1982). Unlike the Pennsylvania's Workers Compensation statute, the PSOB Act has no special provision affording coverage for junior firefighters who have no fire suppression authority.

While these arguments may merit some consideration, the fundamental issue here is what is meant by "firefighter" in the PSQB Act and regulations. To determine this, it is necessary to examine Congressional intent; The plain language meaning of firefighter is a "person who fights fires." (Webster's Dictionary, 14 Ed.) When terms used in a statute are undefined they are given their ordinary meaning. Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995) (the Court relied on the dictionary definition of "marketing"). This plain meaning of "firefighter" was apparently so obvious that Congress did not bother to add any further definition. The original House Bill for the Firefighters Benefits Act of 1975 (H.R 365), which later evolved into the PSOB Act of 1976, included in its definition of " eligible firefighter' an individual ", . , actually and directly engaged in fighting a fire; or otherwise engaged in performance of his duty where the activity is determined by the Administration [LEAA) to be potentially dangerous to the firefighter," See Cong. Rec. H 3741, Apr. 30, 1976. "Since firefighting has been determined to be one of the most dangerous profcssions, it is the intention of the committee that coverage should extend to all hazardous activities performed by firemen when they are actually and directly engaged in fighting fires" Cong. Rec. H 3738, Apr. 30, 1976.

Because the intent of Congress seems indisputable, there can be no question that the term "firefighter" must be given its plain meaning, i.e., one who is authorized to fight fires. One must be authorized to actively engage in the suppression, o£ fires to be a "firefighter" under the Act.

In addition to the Act's legislative history, the "line of duty" definition in the PSOB regulations clearly supports the conclusion that one must be authorized to fight or suppress fires to be a "firefighter" under the Act. The PSOB regulation at 28 CFR 32(c)(1) provides that "line of duty" means "[A]ny action which an officer whose primary function is crime control or reduction, enforcement of the criminal law, or...suppression of fires is authorized...to perform..."' (Emphasis added) This definition demonstrates that one cannot be acting in the "line of duty" unless he or she is authorized to be engaged in the suppression of fires--in other words, to be a firefighter.

The Commentary accompanying the PSOB regulations as issued by LEAA long ago in 1977 corroborates this conclusion that "suppression of fires" is an integral element of what constitutes a "firefighter" under the Act. The Commentary provides: an-individual is covered by the Act if they are performing an activity, or in a category of personnel listed in the definitions of "law enforcement officer" or "fire fighter, subject to the definition of "line of duty." Commentary, 42 F.R. 23252, May 6, 1977.

Even assuming arguendo that the meaning of "firefighter" is not plain and clear, an agency's interpretation of the law where the law is not clear or it is ambiguous will be sustained if it is a permissible interpretation. In Chacon v. US, 48 E. 3rd 509 (1995) the United States Court of Appeals Federal Circuit,, was faced with an issue with regard to the interpretation of the law It ,stated that under the circumstance it would have to use the analytic framework from the Supreme Court in Chevron US.A. Inc. v. Natural Resources 512 Defense Council Inc. 467 U.S. 837 (1984)

When a court reviews an agency's constriction of the statute which it administers, it is Congress with two questions. First, always, is the question whether Congress has directly spoken

to the precise question at issue. 1f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation Rather, if the statute is silent or ambiguous with respect to the specific issue, thc question for the court is whether the agency's answer is based on a permissible Construction of the statute. Id at 842-843,144S.Ct. at 2782 (foatnotes omitted). Importantly, "[t]he court need not conclude that the agency contruction was the only one it permissibly could have adopted" in order to be required to affirm. Id. At 843 n,11,.104 S.Ct. at 2782 n.11. Where, as here, ``the legislative delegation to an agency on a particular question is implicit rather than explicit,"we must affirm any reasonable interpretation made by the administrator of [the] agency. Id at 844,104 S.Ct. at 2782 (footnote omitted). Accord Newman v Teigeler. 898 F.2nd 1574. 1576 (Fed.Cir.) 1990; Beneficial Corp and Subsidiaries v. United Stares, 814 F2nd 1570, 1574 (Fed.Cir.)1987.

The Bureau of Justice Assistance bas construed the term "firefighter" to mean a person with full authority to engage in, f ighting and suppression of frees, including the authority to enter burning buildings, put out car fires and handle hazardous materials. Congress implicitly delegated authority to interpret the PSOB Act to the Bureau of Justice . Assistance (BJA) and this interpretation of the meaning of "firefighter" is reasonable, permissible, and within the authority of BJA to apply in claims involving firefighters. If the term should be read as ambiguous, this interpretation of "firefighter" meets the Chevron test discussed in Chacon of a "reasonable interpretation made by the [agency] administrator" and should be sustained by the courts. See Chacon. supra, at 511-512.

BJA's Interpretation of the term "firefighter" has always been given its plain common, usual meaning - a person 'who fights fires. Both the legislative history as outlined above and definitions of "firefighter" found in other Federal statutes and regulations are consistent with the BJA interpretation of the term. (Sec 29 U.S.C. § 203(7), Fair Labor Standards;, 5 CFR Sec. 42.802, Feral Employees Retirement System; and 44 CFR 152.2, Federal Emergency Management Agency.)

The Pennsylvania Statue and regulation are very clear that 14 and 15 year old junior firefighter are prohibited from being directly involved in the suppression of fires. These junior firefighters do not have the authority engage in fire suppression activities which is a fundamental eligibility requirement under the PSOB Act, Therefore., the BJA denial of benefits to the claimant in this case must be sustained.

SEP 16 2002
U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Assistance
Julie Amber-Messick
5200 Hilltop Drive BB9
Brookhaven, PA 19015

Dear Ms. Amber-Messick:

A comprehensive review has been conducted regarding the claim for death benefits you filed with the Public Safety Officers' Benefits (PSOB) Office following the death of your son, Apprentice Volunteer Firefighter (VFF) Christopher Nicholas Kangas. Unfortunately, based on this review, which included independent analyses by legal and/or medical experts of all information submitted in support of your claim, it has been determined that the claim had to be denied. While the PSOB Act (42 U.S.C. 3796) requires this determination, such action does not diminish VFF Kangas' distinguished record of public service.

We have enclosed a copy of the official determination which specifies the legal basis far denial. In addition, copies of the law governing the benefits program and the regulations which guide its application are enclosed for your information.

Section 32.24a) of the PSOB implementing regulations (28 CFR 32) sets forth appeal procedures. Should you choose this course of action, your request must be submitted within 30 days of receipt of this letter. Appeals are most often submitted based on the availability of new relevant evidence that might support a finding of eligibility.

We regret the loss of VFF Christopher Kangas and extend our best wishes to you and your family.

If you need any assistance, please contact this office at (202) 307-0635 or 1-888-744-6513.

Sincerely,

Marion C. Winfield
Division Director
Office of Benefits

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Assistance

PUBLIC SAFETY OFFICERS' BENEFTS ACT CLAIM DETERNMATION

Case Number: 2002-117
Full Name: Christopher Nicholas Kangas Title: Apprentice Volunteer Firefighter (VFF) Department/Agency: Brookhaven Fire Company No. 1 Location: Brookhaven, Pennsylvania 14015

Case Summary: On May 4, 2002, Apprentice Volunteer Firefighter Christopher Nicholas Kangas was at home, when he heard the Brookhaven fire alarm sound. While riding his bicycle to the station, he was struck by a car. Apprentice VFF Kangas was thrown onto the hood of the vehicle and struck his head on the windshield. He was seriously injured with head trauma and was transported to the local trauma unit. Apprentice VFF Kangas was later flown to the Children's Hospital in Philadelphia, where he was pronounced dead on May 5, 2002 from multiple injuries.

Determination: Based, on the Report of Public Safety Officer's Death submitted by Brookhaven Fire Company No. 1, the Claim for Depth Benefits submitted by his mother, Julie Amber-Messick and an analysis of the evidence presented in this case, the Bureau of Justice Assistance (BJA) has determined that the death of Apprentice VFF Christopher Nicholas Kangas, is not covered under the PSOB Act (42 U.S.C., Section 4796 et.seq. (as amended)) and its implementing regulations, Apprentice Kangas was not a public safety officer as defined under the PSOB Act.

Public safety officer is defined as "any individual sewing a public agency in an official capacity, with a public agency in

an official capacity, with or without compensation, as a law enforcement officer, firefighter, rescue squad member or ambulance crew member." 42 U.S.C., Section 3746b(8).

The evidence presented shows that Apprentice VFF Christopher Nicholas Kangas was not a public safety officer with Brookhaven Fire Company No. 1 in, an official capacity as a firefighter. The activities permitted by the position description for apprentice volunteer firefighters submitted by the fire company allowed minors 14 and 15 years old (including Apprentice VFF Kangas) to participate in training activities, provide first aid care to victims at emergency scenes and assist with clean-up activities such as rolling hose, putting away portable tools, removing debris under supervision of the officer in charge and outside of fire buildings and collapse zones. He was allowed to provide canteen (food service) activities and participle in a support capacity for searches, rescues, wild fires, hazardous materials incidents, and water supply operations. However, Apprentice VFF Kangas was not permitted to operate equipment or assist with fire suppression at fire scenes or enter hazardous atmospheres. Apprentice VFF Kangas was a trainee but did not possess authority to act as an official firefighter.

Accordingly, based on the evidence presented in this case, BJA has determined that Apprentice VFF Christopher Nicholas Kangas does not qualify as a public safety officer as required by the PSOB Act. Therefore, Apprentice VFF Kangas' survivor is ineligible for the benefit authorized be paid throught the PSOB Program.

Q. Could you give us an estimate of what percentage of firemen start out as junior firefighters?

A. Approximately -- I mean, in our department alone I can tell you probably three-quarters of our department started out as junior firefighters and every line officer in our fire department was a junior firefighter when they started from chiefs to captains to lieutenants to engineers to safety officers and every single person on there was a Junior firefighter.

No. 07-176

In the Supreme Court of the United States

JULIE AMBER-MESSICK, ADMINISTRATRIX OF THE ESTATE OF CHRISTOPHER KANGAS, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the Bureau of Justice Assistance's interpretation of the term "firefighter," as used in the Public Safety Officers' Benefits Act of 1976, 42 U.S.C. 3796 *et seq.*, was entitled to deference.

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In the Supreme Court of the United States

No. 07-176

JULIE AMBER-MESSICK, ADMINISTRATRIX OF THE ESTATE OF CHRISTOPHER KANGAS, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-22a) is reported at 483 F.3d. 1316. The opinion of the United States Court of Federal Claims (Pet. App. 23a-50a) is reported at 70 Fed. Cl. 319.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2007. A petition for rehearing was denied on May 11, 2007 (Pet. App. 51a-52a). The petition for a writ of certiorari was filed on August 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Public Safety Officers Benefit Act of 1976 (PSOBA or Act), 42 U.S.C. 3796 *et seq.*, provides for the payment of a one-time, lump-sum benefit of $250,000 "[i]n any case in which the Bureau of Justice Assistance * * * determines, under regulations issued pursuant to [the Act], that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty." 42 U.S.C. 3796(a) (Supp. IV 2004).

At the time in question, the Act defined "public safety officer" as including "an individual serving a public agency in an official capacity, with or without compensation, as * * * a firefighter." 42 U.S.C. 3796b(7)(A) (current version to be codified at 42 U.S.C. 3796b(9)(A) (2006)); accord 28 C.F.R. 32.2(j) (2001); cf. 28 C.F.R. 32.3 (2007). The Act further provides that "'firefighter' includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department." 42 U.S.C. 3796b(4) (Supp. IV 2004).

The Bureau of Justice Assistance (BJA) is authorized to establish such rules, regulations, and procedures as may be necessary to carry out the Act. 42 U.S.C. 3796c(a). In determining whether a public safety officer is entitled to a benefit, the BJA gives "substantial weight to the evidence and findings of fact presented by State, local, and Federal administrative and investigative agencies." 28 C.F.R. 32.5.

2. Christopher Kangas was a fourteen-year old "apprentice firefighter" with the Brookhaven, Pennsylvania, Volunteer Fire Department. Pet. App. 54a. On May 4, 2002, Kangas rode his bicycle toward the fire station in response to a fire alarm. He ran through a stop sign

and was st[illegible]k by an automobile. He died as a result of the accident. *Id.* at 54a-55a.

At the time of Kangas' death, Pennsylvania child labor laws specifically limited the types of activities in which minors who were associated with of a volunteer fire department could participate. See 43 Pa. Cons. Stat. Ann. § 48.3 (West Supp. 2001). Minors under the age of sixteen were permitted to participate only in training, first aid, clean-up activities after a fire is under control, and food and drink services. *Id.* § 48.3(b). Further, minors under the age of sixteen were specifically prohibited from operating high pressure fire hoses or climbing ladders, except in training. *Id.* § 48.3(c). And no minors could operate an aerial ladder, platform, or jack; use wire cutters and other cutting devices; operate fire pumps at any fire scene; or enter a burning structure. *Id.* § 48.3(a)(3).

3. In June 2002, petitioner, Kangas' mother, filed a claim for death benefits pursuant to the PSOBA. Pet. App. 55a. On September 16, 2002, the BJA issued an initial determination denying the claim because Kangas was not a "public safety officer" within the meaning of the Act. *Id.* at 75a. The BJA explained that the "evidence presented shows that [Kangas] was not a public safety officer with Brookhaven Fire Company No. 1 in[ ] an official capacity as a firefighter[.] * * * [Kangas] was a trainee but did not possess authority to act as an official firefighter." *Id.* at 78a. Petitioner appealed the initial denial of benefits to a BJA hearing officer. *Id.* at 55a, 65a.

The BJA conducted a hearing on January 22, 2004. Pet. App. 66a. After hearing several witnesses and reviewing the submitted documents, the hearing officer determined that Kangas was not a "firefighter" within

the meaning of the Act, because, pursuant to Pennsylvania law, fourteen- and fifteen-year old individuals "do not have authority to engage in fire suppression activities." *Id.* at 74a. Petitioner appealed the hearing officer's determination to the BJA Director.

On April 28, 2005, the BJA Director issued the agency's final decision denying the claim. Pet. App. 53a. The Director concluded that, "although young [Kangas] may have been a member of the firefighting community in some sense, he was not a 'firefighter' within the meaning of the PSOB Act, because he had no legal authority to fight fires [under Pennsylvania law]." *Id.* at 54a. The Director further determined that, "[e]ven if [Kangas] were a 'firefighter' within the meaning of the PSOB Act, his tragic death did not occur in the 'line of duty,' as defined in the PSOB regulations, because Pennsylvania law did not obligate or authorize him to engage in firefighting or fire-suppression activity." *Id.* at 58a. In view of those determinations, the Director noted that it was unnecessary to decide whether Kangas' possible negligence would preclude payment of the claim, see 42 U.S.C. 3796a(1) and (3). Pet. App. 63a n.9.

4. On June 27, 2005, petitioner filed a complaint in the Court of Federal Claims (CFC) seeking review of the agency's final decision. Pet. App. 29a. The CFC possesses jurisdiction to review BJA decisions to determine (1) whether there has been substantial compliance with statutory requirements and provisions of implementing regulations; (2) whether there has been any arbitrary or capricious action by government officials involved; and (3) whether substantial evidence supports the decision. *Chacon* v. *United States*, 48 F.3d 508, 511 (Fed. Cir. 1995).

The CFC set aside the BJA's determination and awarded benefits to petitioner. Pet. App. 47a-48a. The CFC concluded that Kangas was a "firefighter" for purposes of the Act because he was "part of a team dedicated to the suppression of fires and control of fire scenes." *Id.* at 45a. The CFC further concluded that Kangas died in the "line of duty" because his "primary function was to be part of the team that engaged in 'the suppression of fires.'" *Id.* at 46a. The court granted judgment in favor of petitioner in the amount of $250,000, adjusted in accordance with 42 U.S.C. 3796(h). Pet. App. 48a.

5. The court of appeals reversed. Pet. App. 1a-22a. The court concluded that Christopher was not a firefighter under the PSOBA. *Id.* at 14a. In reaching that conclusion, the court applied the two-step inquiry directed in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) (*Chevron*). Pet. App. 11a.

The court of appeals first held that "Congress has not directly spoken to the precise question of whether the term 'firefighter' covers a minor apprentice firefighter" prohibited by law from engaging in certain firefighting activities. Pet. App. 11a. The court rejected petitioner's (and the CFC's) argument that the PSOBA established an unambiguous definition of "firefighter" by providing that "firefighter includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department." *Ibid.* (citing 42 U.S.C. 3796b(4) (Supp. IV 2004)). As the court explained, that language in the Act was meant to include *volunteer* firefighters in the PSOBA's coverage, not to define "firefighter." *Ibid.* Moreover, the court of appeals explained that, if the language were interpreted as a comprehensive definition of the term "firefighter,"

firefighters serving in *professional* fire departments would have been excluded from the Act's coverage—an obviously absurd result. *Ibid.*

The court of appeals next determined that the BJA's conclusion that Kangas was not a "firefighter" was permissible. Pet. App. 12a-13a. The court concluded that the BJA's interpretation of "firefighter" as one who is "authorized to actively engage in the suppression of fires" is consistent with the ordinary meaning of the word. *Id.* at 12a. Moreover, the court held that this interpretation is consistent with the PSOBA's legislative history. *Ibid.* Applying that definition to petitioner's case, the court concluded that, as a minor "apprentice firefighter," Kangas was not authorized, by operation of Pennsylvania child labor laws, to participate in firefighting activities. *Id.* at 12a-13a. The court of appeals additionally noted that the BJA need not defer to the state agency's determination that petitioner was eligible for a death benefit under state law, because 28 C.F.R. 32.5 mandates "substantial weight" be given only to a state agency's findings of facts, not its legal conclusions. Pet. App. 13a. Accordingly, the court of appeals concluded that the BJA had permissibly decided that Kangas was not entitled to PSOBA benefits. *Ibid.*

Judge Newman dissented, arguing that the BJA's determination conflicted with the Act's "purpose of recognizing the role of the firefighter and others serving the public." Pet. App. 20a.

ARGUMENT

The court of appeals properly applied well-established principles of *Chevron* deference to conclude that the BJA's interpretation of "firefighter" in the PSOBA is permissible and entitled to deference. The decision of

the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. a. The court of appeals correctly determined (Pet. App. 11a) under *Chevron*'s first step that Congress has not "directly spoken to the precise question" whether a minor apprentice firefighter, whom state law does not authorize to engage in fire suppression duties, is a "firefighter" under the Act. See 467 U.S. at 842.

The PSOBA elaborates the term "firefighter" only in 42 U.S.C. 3796b(4) (Supp. IV 2004), which states that "'firefighter' includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department." Section 3796b(4) plainly does not define "firefighter" as such, because it references solely persons associated with a volunteer fire department. Rather, as the court of appeals concluded, Congress included that language in the PSOBA to ensure that volunteer firefighters were given the same benefits as professional firefighters, while leaving the term "firefighter" undefined. Pet. App. 11a-12a (citing H.R. Rep. No. 1031, 94th Cong., 2d Sess. 4 (1976)). Thus, "the statute is silent or ambiguous with respect to the specific issue" at hand. *Chevron*, 467 U.S. at 843.

Quoting a portion of Judge Newman's dissent (Pet. 5-6 (quoting Pet. App. 20a-21a)), petitioner argues that the term "firefighter" is not ambiguous in light of the Act's purpose of encouraging and recognizing public service and alleviating burdens placed on public servants and their families. Those broad legislative purposes shed little if any light on the question whether Congress intended an apprentice firefighter, who is not authorized to fight fires, to be eligible for a death benefit. Because "no legislation pursues its purposes at all

costs," *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam), petitioner's arguments based on general statements of purpose cannot overcome the gap in the statute's text.

b. Given that Congress did not define the term "firefighter" in the instant circumstances, the court of appeals properly applied principles of *Chevron* deference to the BJA's interpretation. See Pet. App. 12a; 467 U.S. at 843. The BJA has congressionally delegated authority to adjudicate claims and promulgate rules with legal force, see 42 U.S.C. 3796c(a), and issued its interpretation through a relatively formal adjudicative process. See *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001) (*Chevron* deference is available "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"); *Groff* v. *United States*, 493 F.3d 1343, 1350 (Fed. Cir. 2007) ("Congress intended for the BJA's statutory interpretations announced through adjudication to have the force of law, and * * * those interpretations are therefore entitled to deference under *Chevron*."); cf. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (granting *Chevron* deference to determinations made through adjudication by Board of Immigration Appeals). Accordingly, the BJA's legal conclusion that "firefighter" excludes one who "has no legal authority to engage in fire-fighting," Pet. App. 58a, is eligible for *Chevron* deference.

c. The BJA's legal conclusion reflects a permissible construction of the PSOBA and is therefore deserving of deference. Petitioner argues (Pet. 6) that the Act's silence regarding "firefighter" precludes the BJA from

defining the term with reference to the duties performed by the claimant. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). The BJA reasoned t .at, in the absence of a statutory definition of "firefighter," the term should be given "its ordinary meaning; i.e., * * * someone who is authorized to 'fight fires.'" Pet. App. 58a. Defining "firefighter" by reference to the claimant's job duties is consistent with how one defines any job, and reflects the term's common usage. See *id.* at 12a (listing dictionary entries).

Petitioner relies on the Act's legislative history (Pet. 6-7 (quoting Pet. App. 37a-38a)) to contend that the duties performed by the claimant are irrelevant to PSOBA benefits eligibility. The legislative history, however, suggests only that Congress did not limit benefits to firefighters who died while performing particularly dangerous duties; it says nothing about who qualifies as a firefighter in the first place. The Conference Committee that negotiated the final bill rejected the House proposal which "authorized payment whenever a fireman sustained fatal injuries while actually and directly engaged in fighting fires or in other activities determined * * * to be potentially dangerous." H.R. Conf. Rep. No. 1501, 94th Cong., 2d Sess. 5 (1976). The Committee instead chose the Senate proposal, which "authorized payment of the death benefit to the survivors of law enforcement officers and firemen for all line of duty deaths." *Ibid.* That choice was intended to broaden the qualifying circumstances of a public safety officer's death: "The Managers believe that 'line of duty' is a well established concept and that it is appropriate to extend coverage to all

acts performed by the public safety officer in the discharge of those duties which are required of him in his capacity as a * * * fireman." *Id.* at 6. Thus, the Act's legislative history is silent as to who qualifies as a "firefighter," and it certainly does not undermine the BJA's reasonable definition.

Also demonstrating the permissibility of the BJA's interpretation is the current version of the PSOBA's implementing regulations. The current regulations, which the BJA promulgated after notice and comment, codify the position expressed by the BJA in this proceeding and warrant deference. See 28 C.F.R. 32.3 (2007) (defining "firefighter" as "an individual who is trained in suppression of fire or hazardous-materials emergency response and has the legal authority and responsibility to engage in the suppression of fires"); *Smiley* v. *Citibank, N.A.*, 517 U.S. 735, 744 n.3 (1996) ("[I]t would be absurd to ignore the agency's current authoritative pronouncement of what the statute means."); *United States* v. *Morton*, 467 U.S. 822, 836 n.1 (1984) (deferring to regulation promulgated after suit was initiated because suit raised issue for which Congress delegated authority to agency to address). Because the court of appeals correctly deferred to the BJA's interpretation, further review is unnecessary.

2. Petitioner also asserts (Pet. 8-10) that the court of appeals' opinion included legal errors regarding the PSOBA's legislative history and Pennsylvania's administrative code. Those assertions do not merit further review.

a. The PSOBA's legislative history played a minor role in the court of appeals' ruling in this case, which was premised primarily upon the court's determination that the BJA's exercise of statutory interpretation was

entitled to *Chevron* deference. See Pet. App. 11a-12a. Indeed, the court of appeals cited only one piece of legislative history: a House Judiciary Committee Report which explained that, because "firefighting has been determined to be one of the most hazardous professions, the Committee is of the opinion that coverage should extend to all activities performed by firemen when they are actually and directly engaged in fighting fires." *Id.* at 12a (quoting H.R. Rep. No. 1031, 94th Cong., 2d Sess. 4 (1976)). Petitioner does not allege that the court of appeals inaccurately read the Judiciary Committee Report. Instead, petitioner advances (Pet. 8) the same argument regarding the legislative history that the CFC made, namely that subsequent Conference Committee action enlarged the definition of "firefighter." As demonstrated above, however, the subsequent Committee action enlarged only the qualifying circumstances of death and has no bearing upon the definition of "firefighter."

b. As petitioner notes (Pet. 9), the court of appeals made a trivial error in misreading the Pennsylvania administrative code as prohibiting Kangas from riding in an official vehicle to the scene of a fire. The court made that error in the course of detailing the numerous limitations placed upon minor apprentice firefighters. As the court correctly observed, Kangas' activities were limited to training, first aid, clean-up after a fire is under control, and providing coffee wagon and food services; and he was prohibited from operating fire hoses or ascending a ladder (except in training), or from entering a burning structure. Pet. App. 13a.[1] The fact that Kangas

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[1] Although the court of appeals cited 34 Pa. Code § 11.67(a)(5) (1996), which had been superseded by 43 Pa. Cons. Stat. Ann. § 48.3(c) (West

was permitted to ride in official fire vehicles, though contrary to the court of appeals' understanding, is of no significance to either the court of appeals' rationale or the BJA's determination, both of which focused on the dispositive fact that Kangas was not authorized to fight fires.

3. Petitioner also errs in contending (Pet. 10) that the court of appeals "ignore[d]" the Commonwealth of Pennsylvania's recognition of Kangas as a firefighter. The court correctly concluded that the PSOBA regulations require the BJA to give weight only to a state agency's factual findings, and thus the state agency's legal conclusion that the claimant was eligible for state benefits was irrelevant. Pet. App. 13a; 28 C.F.R. 32.5; cf. *Demutiis* v. *United States*, 291 F.3d 1373, 1379 (Fed. Cir. 2002) (BJA not required to give weight to state agency's legal conclusion that death occurred in "line of duty"); *Yanco* v. *United States*, 258 F.3d 1356, 1360-1363 (Fed. Cir. 2001) (state finding of police officer's entitlement to benefits not controlling because of different statutory benefits requirements), cert. denied, 534 U.S. 1114 (2002). Petitioner provides no reason why the BJA or the court of appeals should nevertheless have deferred to the Pennsylvania benefits determination.

4. Petitioner's assertion (Pet. 4-5) that denying her claim would discourage the future recruitment of firefighters provides no basis for review. Petitioner's assertion rests upon the unsupported speculation that payment of PSOBA benefits to the survivors of minor ap-

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Supp. 2001) (see *id.* § 48.3(e)), in detailing the state law prohibitions upon apprentice firefighters, the superseding statutory provisions continued to prohibit apprentice firefighters under 16 years of age from ascending ladders or operating high pressure hose lines (except during training), or from entering a burning structure. *Ibid.*

prentice firefighters, who are statutorily forbidden to engage in hazardous fire suppression work, is necessary for their recruitment. To the contrary, because minor apprentice firefighters are forbidden from engaging in hazardous fire suppression duties, PSOBA benefits are unlikely to enter into any consideration of whether to become an apprentice firefighter. In any event, petitioner's policy argument should be addressed to Congress, not this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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